(22,927)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 122.

ROBERT B. ROSS AND FANNIE D. ROSS, PLAINTIFFS IN ERROR,

vs.

JAMES DAY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 2, 1913.

1 UNITED STATES OF AMERICA, ss:

To James Day, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of Oklahoma, wherein Robert B. Ross and Fannie D. Ross are the plaintiffs in error and you are the defendant in error, to show cause, if any there be, why the decree rendered against said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John B. Turner, Chief Justice of the Supreme Court of the State of Oklahoma, this 27th day of September in the year of our Lord one thousand nine hundred and eleven.

[Seal Supreme Court, State of Oklahoma.]

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Service of the above citation accepted this 29th day of September, A. D., 1911.

VEASEY & ROWLAND,
J. D. TALBOTT,
Attorneys for Defendant in Error.

Filed Oct. 6, 1911. W. H. L. Campbell, Clerk.

In the Supreme Court of Oklahoma.

ROBERT B. ROSS and FANNIE D. ROSS
vs.
J. GEORGE WRIGHT and JAMES DAY.

I, W. H. L. Campbell, Clerk of the Supreme Court of Oklahoma, do hereby certify that on the 6" day of October, in the year of our Lord one thousand nine hundred and eleven, a copy of the foregoing citation was lodged in my office at Oklahoma City, Oklahoma.

Witness my hand and the seal of said Court this 6" day of October, A. D., 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of Supreme Court,
By JESSIE PARDOE, *Deputy.*

2 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also the rendition of the decree of a plea which is in the said Supreme Court before you, or some of you, between Robert B. Ross and Fannie D. Ross and James Day, a manifest error hath happened, to the great damage of the said Robert B. Ross and Fannie D. Ross, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if decree be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same in said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable, Edward D. White, The Chief Justice of the United States, the 21st day of September, in the year of our Lord one thousand nine hundred and eleven.

The seal of the Circuit Court of the United States for the Eastern District of Oklahoma.

[Seal of the United States Circuit Court, Eastern District of Oklahoma.]

L. G. DISNEY,
Clerk of the Circuit Court of the United States, Eastern District, Oklahoma.

Filed Sep. 27, 1911. W. H. L. Campbell, Clerk.

In the Supreme Court of Oklahoma.

ROBERT B. ROSS and FANNIE D. ROSS
vs.
J. GEORGE WRIGHT and JAMES DAY.

3 I, W. H. L. Campbell, Clerk of the Supreme Court of Oklahoma, do hereby certify that on the 26th day of September, A. D., 1911, a copy of the foregoing writ of error for the defendant in error James Day, was lodged in my office, at Oklahoma City, Oklahoma.

Witness my hand and the seal of said Court this 26th day of September, A. D. 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of Supreme Court,
By JESSIE PARDOE, *Deputy.*

4 UNITED STATES OF AMERICA,
State of Oklahoma:

To the Honorable John B. Turner, Chief Justice of the Supreme Court of the State of Oklahoma:

The petition of Robert B. Ross and Fannie D. Ross respectfully shows that on the 27th day of June, A. D. 1911, the Supreme Court of the State of Oklahoma rendered a final decree against your petitioners in a certain cause wherein your petitioners were plaintiffs in error and James Day was defendant in Error, for costs and awarded execution thereon, as will appear by reference to the record and *and* proceedings in said cause; and that said Court is the highest Court in said State in which a decision in said Cause could be had.

And Your petitioners claim the right to remove said decree to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes of the United States, because in said suit your petitioners claimed the right to certain lands in the Cherokee Nation as citizens thereof under treaties between the United States and said Cherokee Nation and Acts of Congress relating to the allotment of lands in severalty among the Cherokee Indians, and the decree of the said Court denied their right, as appears by the record of the proceedings in said cause, which is herewith submitted.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas; and your petitioners will ever pray.

Assignment of Error herewith.

ROBERT B. ROSS.
FANNIE D. ROSS.
K. S. MURCHISON,
Attorney for Petitioners.

STATE OF OKLAHOMA,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Robert B. Ross and Fannie D. Ross to James Day, in the sum of one thousand ($1,000.00) Dollars; said bond when approved to act as a supersedeas.

Dated 11th day September, 1911.

JOHN B. TURNER,
Chief Justice of the Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

5 [Endorsed:] No. 927. Petition for Writ of Error and Order Allowing same. Filed Sep. 11, 1911. W. H. L. Campbell, Clerk.

6 In the Supreme Court of the United States, Term —.

Civil. No. —.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs in Error,
vs.
JAMES DAY, Defendant in Error.

Assignment of Error.

Comes now, Robert B. Ross and Fannie D. Ross the plaintiffs in error by their counsel, and respectfully represent that they feel themselves aggrieved by the proceedings and decree of the Supreme Court of the State of Oklahoma in the above entitled cause and say that there are errors in the record of the same and assigns errors thereto as follows:

1. The Court erred in enterring its Decree against the Plaintiff in Error and in behalf of the Defendant in Error.

2. The Court erred in finding that the work performed and the posts set on the lands in controversy by the plaintiffs in error did not entitle them to select the said lands as lands on which they, the plaintiffs in error owned improvements, within the meaning of the Act of Congress of July 1, 1902. Section 11.

3. The Court erred in not holding that, the right of occupancy of the lands in controversy, being in the plaintiffs in error, they were entitled to select said land to be allotted to them under the provision of Section 11 of the Act of Congress of July 1, 1902.

4. That by the Decree and decision of the Court the said Robert B. Ross and Fannie D. Ross are deprived of their property without due process of law, contrary to the Constitution of the United States.

5. That the decision and decree of the Court in the above entitled cause is contrary to law.

7 Wherefore the said Robert B. Ross and Fannie D. Ross, plaintiffs in error, pray for a reversal of the Decree of the Supreme Court of the State of Oklahoma entered in the above entitled cause.

ROBERT B. ROSS,
FANNIE D. ROSS,
By KENNETH S. MURCHISON,
Attorney for Plaintiffs in Error.

Filed Sept. 11, 1911.
W. H. L. CAMPBELL, *Clerk.*

8&9 Know all men by these presents, that we, Robert B. Ross and Fannie D. Ross, as principals, and The Empire State Surety Company, a corporation of City of New York, New York, are held and firmly bound unto James Day, in the penal sum of one thousand ($1,000.00) dollars, lawful money of the United States for the payment of which, well and truly to be made, we bind

ourselves our heirs, executors and administrators, jointly, severally and firmly by these presents:

In witness whereof the parties hereto have set their hands this 21st day of September, 1911.

The condition of this obligation is such, that whereas the said James Day, did, on the 27th day of July, 1911, in the Supreme Court of the State of Oklahoma, aforesaid, and of the May term thereof, A. D. 1911, recover a judgment against the above bounden, Robert B. Ross and Fannie D. Ross, for costs of suit; from which said judgment of said Supreme Court of the State of Oklahoma the said Robert B. Ross and Fannie D. Ross *has* prayed for and obtained an appeal to the Supreme Court of the United States of America.

Now, therefore, if the said Robert B. Ross and Fannie D. Ross shall prosecute their said appeal with effect, and moreover pay the amount of the judgment against them, interest, damages and costs rendered and to be rendered against them in case said judgment shall be affirmed the above obligation to be then void, otherwise in full force and virtue.

ROBERT B. ROSS,
FANNIE D. ROSS,
THE EMPIRE STATE SURETY
COMPANY OF NEW YORK,
By CHAS. WESTERHEIDE,
Attorney in Fact.
W. E. SWERMAN, *Att'y in Fact.*

Approved this Sept. 27, 1911.
JOHN B. TURNER,
Chief Justice.

Filed Sept. 27, 1911.
W. H. L. CAMPBELL, *Clerk.*

Filed June 30, 1909. W. H. L. Campbell, Clerk.

10 In the Supreme Court of the State of Oklahoma.

Civil. No. 927.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs in Error,
vs.
JAMES DAY, Defendant in Error.

Petition in Error.

The petitioners in error, the said Robert B. Ross and Fannie D. Ross, by their solicitor, Kenneth S. Murchison, feeling themselves aggrieved by the rulings and decree of the Honorable T. L. Brown, Judge of the District Court for the Second Judicial District of the State of Oklahoma, sitting at Bartlesville for Washington County,

present this, their petition in error and say that in the record of the proceedings in this cause in the said Court below as set forth in the case made filed in this Court there are manifest errors committed by the said Court below more specifically shown in the following, to-wit:

First. The Court erred in overruling the motion of plaintiffs for judgment on the report of the referree at the trial of this cause in the Court below to which action of the Court the plaintiffs and each of them at the time duly excepted.

Second. The Court below erred in setting aside the findings and report of the referree and proceeding to hear and determine the cause upon evidence taken in the case and upon arguments of counsel to which ruling of the Court the plaintiffs herein and each of them then and there duly excepted.

Third. The Court erred in his final decree in finding and ruling for the defendent and in not finding for the plaintiff, to which finding and ruling of the Court the plaintiffs, and each of them, then and there excepted.

Fourth. The Court erred in that its findings for the defendent is not warranted by the evidence taken in said cause, is not
11 & 12 supported by the law nor the facts as found and reported by the referree, to which finding the plaintiffs excepted.

Fifth. The Court erred in decreeing, "That the Plaintiffs take nothing by *there* suit herein and that the Defendent have and recover of the plaintiffs the costs including the Referree's Costs and expenses," to which decree the Plaintiffs and each of them, then and there duly excepted.

Wherefore for the errors hereinabove specified and for divers other errors apparent upon the face of the record the Plaintiffs in Error herein pray that the said decree and order and proceedings in the said District Court for the Second Judicial District State of Oklahoma, sitting at Bartlesville for Washington County be reversed by a decree of this Court and remand- to the aforesaid District Court with direction to vacate the said decree heretofore rendered and enter therein a decree granting the plaintiffs in error the relief prayed for in their amended petition.

KENNETH S. MURCHISON,
Solicitor for Plaintiffs in Error.

Filed June 30, 1909.

W. H. L. CAMPBELL, *Clerk.*

STATE OF OKLAHOMA,
County of Cherokee, ss:

Robert B. Ross, one of the Plaintiffs in Error herein being sworn according to law states that he has heard the foregoing Petition in Error read and knows the contents thereof; that the facts and statements therein contained and the assignments of error noted therein are true and correct as he verily believes.

ROBT. B. ROSS.

Subscribed and sworn to before me this 19th day of June, 1900.

[SEAL.] J. I. PITCHFORD,
Notary Public.

Filed June 30, 1900.
W. H. L. CAMPBELL, *Clerk.*

My commission expires November 5, 1912.

BARTLESVILLE, OKLAHOMA, *June 24, 1900.*

Service of a copy of the above and foregoing petition in error on counsel for defendants in error is this day acknowledged.

VEASEY & ROWLAND,
Solicitors for Defendant in Error.

In the Supreme Court of the State of Oklahoma.

Civil. No. 927.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
J. GEO. WRIGHT, Commissioner, etc., and JAMES DAY, Defendant.

Record in Case-Made on Appeal from the District Court for the Second Judicial District, State of Oklahoma, Sitting at Bartlesville, for Washington County.

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KENNETH S. MURCHISON,
Solicitor for Plaintiffs.
VEASEY AND ROWLAND,
Solicitors for Defendant.

14 In the District Court for the Second Judicial District of the State of Oklahoma, Sitting at Bartlesville for Washington County.

Civil. No. 389.

ROBERT B. ROSS and FANNIE D. ROSS
vs.
J. GEORGE WRIGHT, Commissioner to the Five Civilized Tribes, and JAMES DAY, Defendants.

Case-Made for Appeal.

Be it remembered that heretofore, towit: on the 4th day of October 1907, the plaintiffs herein filed in the office of the clerk of the United States Court for the Western District of the Indian Territory sitting at Muskogee for said District, their amended complaint complaining of the defendants in words and figures following towit:

In the United States Court for the Indian Territory, Sitting at Muskogee for the Western District.

Equity. No. 7933.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner to the Five Civilized Tribes, and JAMES DAY, Defendants.

Amended Complaint.

To the Honorable William R. Lawrence, United States Judge:

The Plaintiff- herein, Robert B. Ross and Fanie D. Ross, complain of the Defendants, the said J. George Wright, and James Day, and respectfully represent unto the Court:

First. That plaintiff, Robert B. Ross, is a citizen of the Cherokee Nation of Indians by blood and nativity, and of the United States by virtue of the provisions of an act of congress approved February 8, 1887, as amended by an act of Congress approved March 3, 1901, and resides at Tahlequah, in said Cherokee Nation, Indian Territory.

Second. That plaintiff, Fannie D. Ross, is the wife of plaintiff, Robert B. Ross, is a citizen of the Cherokee Nation by blood and nativity and of the United States by virtue of the Acts of Congress cited in the foregoing paragraph, and resides at the town of Tahlequah, in the said Cherokee Nation, Indian Territory.

Third. That in all the transactions hereinafter described plaintiff, Robert B. Ross, acted for himself and as agent for plaintiff, Fannie D. Ross, his wife, and said transactions were performed by said plaintiff, Robert B. Ross, with a view to and for the purpose of securing the lands hereinafter described as a part of his allotment, and of the allotment of the plaintiff said Fannie D. Ross, as Cherokee Indians.

Fourth. That the defendent J. George Wright is a citizen of the United States, and occupi-s the official position of Commissioner to the Five Civilized Tribes with offices at Muskogee, and resides in the City of Muskogee, Indian Territory.

Fifth. That defendent James Day, is a citizen of the Cherokee Nation by adoption, being a Delaware Indian by blood, and resides in the Cherokee Nation, near the town of Bartlesville, Indian Territory.

Sixth. That on the 1st day of September 1902, and at all times thereafter the plaintiffs, the said Robert B. Ross and Fannie D. Ross, were and have been citizens of the Cherokee Nation, residing in the said Nation with the full and undisputed right to enrollment as such citizens, and to participation in the allotment of lands of the Cherokee Tribe of Indians, and the distribution of the other common property and funds of said tribe. And the said plaintiffs were duly and legally enrolled for the purpose of such allotment by the authorities of the United States Charged with that duty by law.

Seventh. That by Article 1, Section 2, of the Constitution of the Cherokee Nation, the citizens of said nation were and are secured in their right of property in the improvements made by them respectively, or of which they might be in lawful possession in the following language to wit:

"The lands of the Cherokee Nation shall remain common property; but the improvements made thereon and in the possession of the citizens of the Nation, are the exclusive and indefeasable property of the citizens respectively who made, or may rightfully be in possession of them; provided, that the citizens of the nation possessing exclusive and indefeasable rights to their improvements as expressed in this article, shall possess no right or power to dispose of their improvements, in any manner whatever, to the United States, individual states, or to individual citizens thereof."

Eighth. That under the laws of the Cherokee Nation in force in the year 1902, and at all times since that year, citizens of the Cherokee Nation owning improvements on the public domain thereof were authorized to sell and convey such improvements by bill of sale, to other citizens of the said nation, who thereby succeeded to all the rights of property in such improvements previously enjoyed by

the original owner or maker of such improvements, such right of free sale of improvements by one citizen of the Cherokee Nation to another citizen thereof being secured by Section 706 of the Laws of the Cherokee Nation 1892 page 351, which provided in part as follows:

"It shall not be lawful for any citizen of the Cherokee Nation to sell any farm, or other improvement in the said nation, to any person other than a "Bona fide" citizen thereof."

Ninth. That by the Act of congress entitled, "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes," approved July 1, 1902, a scheme for the allotment in severalty of the public lands of the Cherokee tribe of Indians was adopted by Congress to be valid and effective only when "Ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation." Said Act was submitted for its ratification or rejection to the "Legal Voters" of the Cherokee Nation, at an election held for that purpose on the 7th day of August, 1902, and a majority of the votes of such legal voters being cast for its ratification the same was on that date ratified.

Section Eleven of said Act provides that "There shall be
16 allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

Tenth. That on November 1, 1902, and for some time prior thereto, George B. Keeler, a citizen of the Cherokee Nation by intermarriage, had enclosed and held undisputed possession of a large body of land in the Cherokee Nation embracing among other tracts the N/2 of the NE/2 of the NW/4, and the SE/4 of the SE/4 of the NW/4 Section 19, Township 26, north of range 13 east of the Indian Base and Meridian, containing thirty acres, more or less; that prior to the said first day of November, 1902, the plaintiff Robert Ross, acting for himself and as agent for the plaintiff Fannie D. Ross, had made verbal agreement with the said George B. Keeler, to purchase the right of the said Keeler to the possession of the above described tracts, which arrangements were consummated on that date by the execution and delivery, by the said George B. Keeler unto the said plaintiff, Robert B. Ross, of a bill of sale conveying to said Ross the improvements and all the right title and interest of the said Keeler in and to the said described lands for a valuable consideration, in words and figures as follows; to wit:

"Bill of Sale.

Know all men by these presents that for and in consideration of ($100.00) One Hundred Dollars cash in hand paid me, the receipt

of which is hrer-by acknowledged I hereby sell, transfer and deliver unto Robert B. Ross the following described improvements together with the right, title and interest in and to the following described lands: N/2 of NE. 4 of NW/4 of Sec. 19, Twp. 26, N., Rang- 13 E. SE/4 of SE/4 of NW/4 Sec. 19 Twp. 26 N. Range 13 E. and all improvements situated on said land.

"In witness whereof I have hereunto set my hand this the 1st day of November, 1902.

GEORGE B. KEELER."

Witnesses:
W. B. EIDSON.
F. A. GOODYKOONTZ.

(The original of the foregoing bill of sale is on file in the office of the defendent, J. George Wright, as Commissioner to the Five Civilized Tribes.")

Eleventh. That for the purpose of erecting a separate fence around the two tracts described, and purchased as aforesaid from the said George B. Keeler, the plaintiff, Robert B. Ross, caused about one hundred posts to be hauled to said tracts in the latter part of October or the early part of November, 1903; and later on, or about the first day of March, 1904, his son Charles M. Ross, together with others, and by the direction and authority of the said plaintiff, Robert B. Ross, went on said described tracts and set up posts thereon preparatory to the erection of fences to separately enclose the said tracts; that plaintiffs are informed and believe and so believing aver that at the time plaintiff's son, said Charles M. Ross, with the other parties employed by plaintiff to assist him, was on said tracts for the purpose of separately fencing them, he met the defendent, Day,
17 and talked with him about the purpose of his visit in the neighborhood, and that although said Charles M. Ross told the defendent, Day, that he was on the premises for the purpose of erecting separate fences around the tracts described, said Day not only made no objections thereto, but specifically disclaimed any interest in any of the lands described or any lands on the west side of Caney River at that point.

Twelfth. That at the time plaintiff's said son, Charles M. Ross, went on said tracts for the purpose of separately fencing the same, that is to say, on or about March 1, 1904, there were absolutely no improvements on either of said tracts, except some cultivation in the NW/4 of NE/4 of NW/4 Section 19, Township 26 North of Range 13 East, and remnants of fencing bought by said plaintiff, Robert B. Ross, from George B. Keeler, as hereinabove described and set forth, and said lands were not in the possession of, nor were they claimed, by any citizen of the Cherokee Nation other than the said plaintiff, Robert B. Ross; that the said Charles M. Ross, with others employed with him, and in accordance with the instructions and authority given him by the said Robert B. Ross one of the plaintiffs herein, on the said first day of March, 1904, or about that date, had the lines of said tract accurately ascertained by a surveyor employed

by him for the purpose and set posts on said lines so thus ascertained preparatory to fencing the same.

Thirteenth. That under Section 702 of the laws of the Cherokee Nation 1892, page 377, every citizen making a location on the public domain of the Cherokee Nation is given six months thereafter within which "to make improvements thereon to the value of fifty dollars," and under this law, the acts of location by Charles M. Ross, for the plaintiff on or about March 1, 1904, secured to the plaintiff the complete right of possession of the tracts described as against all other citizens of the Cherokee Nation for the period of six months from the date of such location independently of the rights of possession acquired by plaintiff by purchase from the said George B. Keeler, as hereinbefore described, and even though the improvements placed on said tracts at the time by the said Charles M. Ross, were of a less value than fifty dollars, if such may have been the fact; but plaintiffs believe and aver that the improvements made by said Charles M. Ross added to the improvements of value already thereon, and belonging to the plaintiff, were reasonably worth more the sum of fifty dollars.

Fourteenth. The plaintiffs are informed and believe, and so believing aver that notwithstanding the right of the plaintiffs to the possession of said tracts, both by the purchase of such right or possession from the said George B. Keeler, and by virtue of the prior location and improvement of the same by the said Robert B. Ross, through the work of his son and others employed by him as herein described, of all of which the defendent James Day, had actual knowledge, the said defendent, Day, with other persons and parties unknown to the plaintiffs, but whom plaintiffs are informed and believe were one L. J. Harned of Coffeyville, Kansas, one Polleck of Bartlesville, Indian Territory and one Wallace Buford of Bartlesville, Indian Territory, and a brother-in-law of said defendent, Day, conspired together for the purpose of unlawfully trespassing on the said lands, and making improvements thereon in defiance of the lawful right of the plaintiffs, and thus to fraudulently and deceitfully establish such a condition in the hope of depriving the plaintiffs, contrary to law and justice, of their right to allot said lands. And said defendent, Day, together with the said Harned, Polleck, and Buford, and by and with their advice and assistance and with the assistance of other parties, to the plaintiff unknown, did go upon the said tracts of land, immediately after said Charles M. Ross, and those
18 employed with him, had left the premises, and did on the evening of the same day, or during the night of the same day, or early in the morning of the following day, surreptitiously, with evil intent, and the purpose of defrauding these plaintiffs out of their just right, title and interest in said lands, and with full knowledge of the rights of the plaintiffs in the premises, well knowing that he, the said Defendent, Day, had no right of any kind in law or in equity to enter upon said premises and that such entry was a violation of the rights of the plaintiffs and an unlawful trespass upon their lands, commenced and made certain improvements thereon, consisting of posts and wire fencing upon which to base his false and

fraudulent claim to a right to select said lands in allotment for himself. And, later, at a date to these plaintiffs unknown, said defendent Day, in order to further strengthen his unlawful claim to said lands for allotment by virtue of a false and fraudulent claim to the ownership of extensive and lawful improvements thereon, erected a small house in the vecinity of one of said tracts and on land adjacent thereto, which he afterwards moved upon said tract, well knowing that in so doing he was trespassing upon the rights of these plaintiffs, and plaintiffs believe and allege that said defendent Day did not erect the fence, or move said House on said tract in good faith but that all his acts were committed with evil intent, and for the purpose of falsely and fraudulantly claiming the right to allot said tracts, in order that he might reap the benefit arising from the development and operation of the same for oil and gas, rich deposits of which are supposed to underlie said lands.

Fifteenth. That said tracts of land are supposed to be rich in deposise of petroleum oil and natural gas, such supposition being based on the development and operation of the lands surrounding and adjacent to the same, these being, as plaintiffs are informed and beleive, a large number of producing oil wells on three sides of each of said tracts, and within two hundred feet of the lines thereof, and the plaintiffs verely believe that the value of the oil and gas under said lands will exceed the sum of One Hundred Thousand Dollars.

Sixteenth. That the defendent Day further pursuing his evil intentions and in furtherance of the conspiracy to cheat and rob these plaintiffs out of their just rights in said lands, secured admission to the land office, of the Commission of the Five Civilized Tribes at Tahlequah, Indian Territory, on May 5, 1904, and made application to have said described tracts of land allotted to him as a part of his allotment as a registered Cherokee Delaware citizen; and, in his said application, the plaintiffs are informed and believe, the said Day falsely and fraudulantly swore that he had the right of possession of said lands, claiming to be the owner of the improvements thereon, alleging that they were lawfully made and owned by him; whereas in truth and in fact the said defendent Day did not own any improvements of any kind or character on said lands, and has not paid anything whatever towards the costs of making such improvements as he claimed to own thereon, but all the material and labor used and employed in the making of said improvements were bought and paid for by the Katie Oil Company, composed, as plaintiffs are informed and believe, of the said L. T. Harned, the said Polleck and one Layman, all non-residents of the Cherokee Nation, who had no right to allotments in the said Nation nor to hold or own any improve-
19 ments on the Cherokee public domain, but with whom the said Day had made a contract to lease said lands to them for oil and gas mining purposes in the event their fraudulent scheme to secure the allotment of said lands to Day was successful.

As soon after May 5, 1904, the date when the said Day made his false and fraudulant application as above described, as the card of admission held by the plaintiff Robert B. Ross, was reached in the call at said Land Office, the said Robert B. Ross on July 1, 1904,

made application to have the NW/4 of NE/4 of NW/4 and the SE/4 of SE/4 of SW/4, Section 19, Township 26 North, of Range 13, East, a part of the lands in controversy herein, allotted to him as a part of his allotment, and to have the NE/4 of NE/4 of NW/4, same section, township and range, allotted to his wife, the plaintiff Fannie D. Ross, as a part of her allotment, and filed contests against the application of said defendent Day, which contests were numbered 1181 and 1182 on the docket of the Commission to the Five Civilized Tribes, and are still carried in the records of the office of the defendent, J. George Wright under those numbers.

Seventeenth. That the said contests, Numbers 1181 and 1182, were consolidated in the office of the defendant, J. George Wright, and heard as one contest, and after full hearings, both parties being present with their witnesses and attorneys, the Commissioner to the Five Civilized Tribes decided both said contests in favor of the contestants, the plaintiffs herein. The contestee, the said defendent Day, having appealed from the decision of the Commissioner to the Five Civilized Tribes, to the Commissioner of Indian Affairs at Washington, D. C., said Commissioner affirmed the same in an opinion dated March 6, 1907. From this decision the contestee the said Day further appealed to the Secretary of the Interior, who in an opinion dated May 31, 1907, erroneously and in total disregard of the rights of the plaintiffs herein, reversed the said Commissioner of Indian Affairs and the Commissioner to the Five Civilized Tribes. The plaintiffs are advised and believe, and so believing aver, that in his opinion the Secretary of the Interior committed many grave and controlling errors of law and clearly misapprehended the facts in the case. The Secretary of the Interior did not take into consideration the laws of the Cherokee Nation which alone provide the rule for the determination of the rights of possession of the lands in controversy, as between the contesting parties, but applied rules of the Department adopted under United States Statutes respecting settlements on the public lands of the United States which the plaintiffs aver are not applicable in this case.

Eighteenth. That if the erroneous decision of the said contest by the Secretary of the Interior is allowed to stand and the lands described herein are allotted and patented to the defendent Day, the plaintiff herein the said Robert B. Ross and Fannie D. Ross, will suffer irreparable injury in their vested property rights for which they do not now, nor will not in the future, have a full, complete and adequate remedy at law.

Nineteenth. The plaintiffs have exhausted their remedy through the executive arm of the government of the United States, The Interior Department, which has and exercised the executive jurisdiction over the question of allotment having by the final decision of the matter by the Secretary of the Interior exhausted its jurisdiction of the controversy, and in the ordinary course of action by the Government of the United States, under this final decision of the Secretary of the Interior, the said defendant, J. George Wright has issued a certificate of allotment to the said defendent Day covering the land described herein, in accordance with

the practice of the office of the said defendent Wright in such matters.

Twentieth. The plaintiffs are informed and believe, and so believing aver, that the defendent Day, has entered into a contract or agreement with the Katy Oil Company, composed of the aforesaid non-citizens Harned, Polleck, and Layman, to lease the said above described lands to the said company for the purpose of operating the same for oil and gas, and if said lease is carried out, in accordance with the unlawful intention of the said defendent Day and the said Harned, Polleck and Layman, the plaintiffs herein will be irreparably damaged in the destruction of the values as to oil and gas mining attached to said lands which the plaintiffs are entitled to take in allotment.

Wherefore plaintiffs pray:

I. That this Court by an order duly issued restrain the defendent Day from receiving or accepting an allotment certificate or deed or patent for the lands in controversy herein, except as trustee to hold the same for the benefit of the plaintiffs herein until such time as this court shall have heard and finally determined the contentions of the plaintiff herein, and upon such final hearing and determination the same be made perpetual.

II. That in the event the said defendent James Day shall receive and accept a certificate of allotment covering the lands in controversy, that this Court will adjudge, order and decree that said Day shall hold such certificate in trust for the benefit of the plaintiffs, until such time as the Court shall have heard and finally determined the contentions of the plaintiffs, herein, and that upon such hearing and final determination said defendent Day be directed and commanded to surrender such certificate to the defendent J. George Wright for cancellation.

III. That upon the final hearing and determination of the contention of the plaintiffs herein, this court will adjudge, order and decree that the plaintiff, Robert B. Ross, is entitled to take as a part of his allotment in the Cherokee Nation as a citizen thereof, the NW/4 of NE/4 of NW/4 and SE/4 of SE/4 of NW/4, Section 19, Township 28, North Range 13 East, of the Indian Base and Meridian; and that the defendent J. George Wright, be commanded and directed to cause a patent or deed to be issued to him therefor.

IV. That upon the final hearing and determination of the Contentions of the plaintiffs herein, this Court will adjudge, order and decree that the plaintiff, Fannie D. Ross, is entitled to take as a part of her allotment in the Cherokee Nation, as a citizen thereof, the NE/4, of NE/4 of NW/4, Section 19, Township 28 North, Range 13 East of the Indian Base and Meridian and that the said Defendent, J. George Wright be commanded and directed to cause a patent or deed to be issued to her therefor.

V. That this Court will adjudge, order and decree that the plaintiffs shall have and take such other and further relief as the Court, in its wisdom, shall deem them to be entitled to receive.

KENNETH S. MURCHISON,
Plaintiff's Solicitor.

UNITED STATES OF AMERICA,
Indian Territory, Northern Judicial District, ss:

21 Personally appeared before me, the Undersigned Notary Public, in and for the Territory and District aforesaid, duly commissioned and acting as such, Robt. B. Ross, who being duly sworn states that he is one of the plaintiffs named in the foregoing bill of complaint; that he has heard the same read and knows the contents thereof; that the facts set forth therein of his own knowledge, he knows to be true, and that the facts stated on information and belief he believes to be true.

ROBERT B. ROSS.

Subscribed and sworn to before me this 4th day of October, 1907.
[NOTARIAL SEAL.] CHAS. T. DIFENDAFER,
Notary Public.

My Commission expires Jan. 24, 1908.

Endorsed on back as follows:
Equity No. 7988. Robert B. Ross, et al., Plaintiffs, vs. J. George Wright, et al., Defendants. Amended Complaint. Northern District, Ind. Terr. Filed Oct. 4, 1907. R. P. Harrison, Clerk U. S. Courts. Kenneth S. Murchison, attorney for plaintiffs, Tahlequah, Ind. Terr.

That thereafter towit: on the 19th day of November, 1907, the State of Oklahoma was admitted as a state in the Union and this cause became pending in the District Court for the Third Judicial District of said State sitting at Muskogee, for Muskogee County and during the month of March, 1908 the following proceedings were had in this cause towit:

#7988.

ROBERT B. ROSS and FANNIE D. ROSS
vs.
J. GEORGE WRIGHT, Commissioner, and JAMES DAY.

And comes the plaintiff and moves the court for an order dismissing this cause as to defendant J. George Wright, Commissioner. And the Court after hearing said motion and being well and sufficiently advised in the premises, it is considered, ordered and decreed that this cause be and the same is hereby dismissed as to defendant J. George Wright, Commissioner.

And thereafter on Wednesday the 5th day of August, 1908, the District Court for the Third Judicial District, Muskogee County Oklahoma met pursuant to adjournment, the Honorable John H. King, Judge, present and presiding and present, W. J. Crump, County Attorney, Tony Matney, Clerk of District Court and R. B. Ramsey, Sheriff.

The Court having been opened in due form of law, the following proceedings were had, to-wit:

22 7938.

ROBERT B. ROSS et al.
vs.
J. GEORGE WRIGHT et al.

Come now the parties hereto by their attorneys, and defendants now on leave of court withdraws the former demurrer filed herein and files special demurrer, and the Court having heard the said demurrer: and being well and sufficiently advised in the premises now over-rules the same, to which the defendent James Day, excepts.

Now the defendent is by the Court allowed 15 days in which to file answer. And now the defendent, Day, files a motion to transfer this cause to the District Court of Washington County, Oklahoma, and the court having heard said motion, and being well and sufficiently advised in the premises, doth sustain the same and it is by the Court ordered that this cause be and the same is hereby transferred to the District Court of Washington County, Oklahoma, and the Clerk of this Court is order-d to prepare a full true and, correct transcript of all the pleadings and orders of this court and transmit the same forthwith to the Clerk of the District Court for Washington County, Oklahoma.

Said demurrer and motion are attached hereto and are as follows, to-wit:

STATE OF OKLAHOMA,
Muskogee County, ss:

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner of the Five Civilized Tribes, and JAMES DAY, Defendents.

Separate Demurrer of James Day.

Comes now defendent, James Day, by his attorneys, Veasey and Rowland and demurs to the amended complaint or petition of the plaintiffs, and for grounds of said demurrer says:

1. That the court has no jurisdiction of the subject of the action.
2. That there is a defect of parties plaintiff.
3. That several causes of action are improperly joined.
4. That the complaint or petition of the plaintiffs does not state facts sufficient to constitute a cause of action.

VEASEY AND ROWLAND,
Attorneys for Defendent Day.

ROBERT B. ROSS et al.
vs.
JAMES DAY.

Motion to Transfer.

Now comes the defendent and moves the court to transfer this cause to the District Court of Washington County, Oklahoma and for cause states.

1st. That defendent resided now and at the time of the filing of the suit in Washington County, Oklahoma.

2nd. The land embraced in this action is located in Washington Oklahoma.

VEASEY AND ROWLAND,
Att'ys for Def.

23 Said demurrer and motion were endorsed on the backs as follows:

7933. Ross et al., vs. Wright and Day, Demurrer Day. State of Oklahoma, County of Muskogee. Filed Aug. 5, 1908. Tony Matney, District Clerk.

7933. Robert B. Ross et al., vs. J. George Wright, et al. Motion to transfer. State of Oklahoma. Filed Aug. 5, 1908. Tony Matney, District Clerk.

That thereafter on the 11th day of September 1908, the defendant James Day, through his attorneys, Veasey and Rowland filed his answer to the complaint of the plaintiffs herein in words as follows, to-wit:

STATE OF OKLAHOMA,
Washington County:

In the District Court in and for said County and State.

No. —.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
JAMES DAY, Defendent.

Answer.

Defendent James Day, for answer to plaintiff's petition says:

First. That he has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first Paragraph of plaintiff's petition.

Second. That he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the Second paragraph of plaintiffs petition.

Third. That he has no knowledge or information sufficient to

form a belief as to the truth of any of the allegations contained in the third paragraph of plaintiffs' petition.

Fourth. That he admits the allegations contained in the Fifth paragraph of plaintiffs' petition.

Fifth. That he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the Sixth paragraph of plaintiffs' petition.

Sixth. That he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the Seventh paragraph of plaintiffs petition.

Seventh. That he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the Eighth paragraph of plaintiffs' petition.

Eighth. That he admits the allegations contained in the Ninth paragraph of plaintiffs' petition.

Ninth. That he denied each and every material allegation contained in the Tenth paragraph of plaintiffs' petition.

Tenth. That he denies each and every material allegation contained in the Eleventh paragraph of plaintiffs' petition.

Eleventh. That he denies each and every material allegation contained in the Twelfth paragraph of plaintiffs' petition.

Twelfth. That he denies each and every material allegation contained in the Thirteenth paragraph of plaintiffs' petition.

Thirteenth. That he denies each and every material allegation contained in the Fourteenth paragraph plaintiffs' petition.

24 Fourteenth. That he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the Fifteenth paragraph of plaintiffs' petition, except that there are a number of producing oil wells in the vicinity of the lands referred to in plaintiffs' petition.

Fifteenth. That he denied each and every material allegation contained in the Sixteenth paragraph of plaintiffs' petition.

Sixteenth. That he admits that contest cases 1181 and 1182 were consolidated in the office of the Commissioner to the Five Civilized Tribes and heard as one contest case, and after full hearing, both parties being present with their attorneys and witnesses, that said Commissioner to the Five Civilized Tribes decided both of said contests in favor of the contestants, the plaintiffs herein; that the contestee, the said defendent Day, appealed from said decision of said Commissioner to the Five Civilized Tribes, to the Commissioner of Indian Affairs at Washington, D. C., said Commissioner affirming the decision of said Commissioner of the Five Civilized Tribes on the 6-h day of March, 1907; that said defendant Day further appealed from the decision of the Honorable, the Commissioner of Indian Affairs in said consolidated cases, to the Secretary of the Interior, who reversed the decisions of said Commissioner to the Five Civilized Tribes and said Commissioner of Indian Affairs, awarding the land in controversy to the plaintiffs, but defendent denies that the Secretary of the Interior committeed many grave and controlling errors of law and clearly misapprehended the facts in the case. Defendent avers the fact to be that the decision of said Secretary of

the Interior in reversing the decision of the Commissioner to the Five Civilized Tribes and the Commissioner of Indian Affairs, and thereby awarding the land described in plaintiffs' petition to the defendent, was in conformity with both law and the facts controlling said case.

Seventeenth. That he denies each and every material allegation contained in the Eighteenth paragraph of plaintiffs' petition.

Eighteenth. That he denies each and every material allegation contained in the Nineteenth paragraph of plaintiffs' petition.

Nineteenth. And defendent further answering plaintiffs' petition denies each and every material allegation contained in said petition not hereinbefore specifically admitted or specifically denied.

Twentieth. And defendent further answering plaintiffs' petition alleges and says that on the first day of September, 1902, and at all times since then, he has been duly and legally enrolled as a Delaware Cherokee Citizen by blood of the Cherokee Indian Nation, and thereby qualified to receive an allotment of lands in said Cherokee Indian Nation by virtue of several laws and treaties controlling the allotment of lands of said Nation; that at all times during the period of twenty-five or twenty-seven years prior to the 5th day of March, 1904, the defendent was the owner of the possessory right to, and the owner of the improvements upon a tract of land in the Cherokee Indian Nation within a quarter of a mile of the lands described in plaintiffs' petition; that the lands thus improved and owned by the defendent constituted the first improvement within a quarter of a mile of the lands described in plaintiffs' petition; that for said period of twenty-five years prior to March 5, 1904, the defendent claimed title to the lands described in plaintiffs' petition by virtue of that provision of the Cherokee Indian Law which enabled a Cherokee Indian citizen to claim all improvements within one-quarter of a mile of his original improvements; that Section 760 of the laws of the Cherokee Nation, 1892, at page 376, provides:

"No person shall be permitted to settle or erect any improvement, or cut and remove timber, within one-fourth of a mile of the house, field or improvement of another citizen, without his, her, or
25 their consent, under the penalty of forfeiting such improvement and labor for the benefit of the original settler."

That at all times during said period of twenty-five years up to and including the 5th day of March, 1904, said law was in full force and effect, so far as the title of improvements upon the domain of the Cherokee Nations were concerned. That during the period last herein mentioned, to-wit: for a period continuing twenty-five or thirty years prior to the institution of this suit, defendent had the sole and exclusive use of the land described in plaintiffs' petition and cut timber therefrom for fuel and for the purpose of building fences on other lands in his possession. That on the 1st day of March, 1904, defendent completely enclosed the lands described in plaintiffs' petition with a two or three wire fence, which at the time of said enclosure comprised the only improvement upon said land other than that made as a clearing by the defendent in cutting tim-

ber and brush from said land; that shortly thereafter, to-wit in the month of March, 1904, defendent built, or caused to be built on the lands described in plaintiffs' petition, a box house consisting of three rooms, which fence and box house constituted the only improvements upon said lands from the 1st day of March 1904, until the time of the institution of this suit, excepting about an acre of land in cultivation, which land had been reduced to cultivation by a noncitizen of the Cherokee Nation; that immediately after the building of said house said defendant removed his family thereto and was actually living in said house upon said land completely enclosed as aforesaid, at the time of contestee's application for the land in controversy on the 11th day of July, 1904; that on said 5th day of March, 1904, defendent appeared before the Cherokee Land Office at Tahlequah, Indian Territory now Oklahoma, and made a formal application to the Commission to the Five Civilized Tribes to have the lands described in plaintiffs' petition set apart and designated as a portion of the allotment of defendent in the Cherokee Indian Nation; that said application for said land was duly accepted by said Commission to the Five Civilized Tribes, and the land mentioned and described in plaintiffs' petition duly set apart and designated by said Commission as a portion of the allotment of defendent in the Cherokee Indian Nation; that defendent has received a certificate from said Commission or Commissioner to the Five Civilized Tribes as prescribed by the regulations of the Secretary of the Interior in connection with the allotment of lands in said Cherokee Indian Nation, which said certificate attests the allotment of the lands described in plaintiffs' petition to defendent. A copy of said certificate is attached hereto, made a part hereof, and marked defendent's Exhibit A.

Twenty-first. That thereafter, to-wit, on the 1st day of July, 1904, the plaintiff Robert B. Ross appeared at the Cherokee Land Office and on his own behalf made application for a portion of the lands described in plaintiffs' petition, to-wit:

North-west Quarter of the Northeast Quarter of the Northwest Quarter, and the Southeast Quarter of the Southeast Quarter of the Northwest Quarter Section 19, Township 26 North, Range 13 East in the Cherokee Indian Nation,

to be set aside as a portion of his allotment in the Cherokee Indian Nation, and at the same time said Robert B. Ross, assuming to act as the agent of the plaintiff Fannie D. Ross, applied for the remaining portion of the lands described in plaintiffs' complaint, to-wit:

Northeast Quarter of the Northeast Quarter of the Northwest Quarter of said Section 19, Township 26 North, Range 13
26 East in the Cherokee Indian Nation as a portion of the allotment of the said Fannie D. Ross; that in conformity with the regulations of the Department of the Interior prescribed in cases wherein there has been a prior selection of the land applied for, said plaintiff Robert B. Ross on his own behalf and assuming to act as the agent of Fannie D. Ross, instituted a contest case against this

defendent, in conformity with said regulations of the Secretary of the Interior in such cases made and provided.

Twenty-second. That said contest cases so instituted by the plaintiffs against this defendent were regularly docketed upon the records of the Commissioner to the Five Civilized Tribes, and said cases designated upon said docket as Cherokee Allotment Contest Cases numbered 1181 and 1182.

Twenty-third. That on the 12th day of January, 1906, after notice duly given as required by said regulations of said Secretary of the Interior with respect to land contest cases covering lands in the Cherokee Indian Nation, the plaintiffs, who were contestants in said contest cases, and this defendent, who was contestee in said contest cases, duly appeared before the said commission to the Five Civilized Tribes with their respective counsel and witnesses; that a hearing upon the issues of said contest cases was duly had on said 12th day of January, 1906 in conformity with said regulations of the Department of the Interior.

Twenty-fourth. That said Commissioner to the Five Civilized Tribes decisde- said contest cases involving the lands described in plaintiffs' petition in favor of the plaintiffs in this action, from which decision this defendent appealed to the Commissioner of Indian Affairs at Washington, D. C., as provided in the regulations of the Secretary of the Interior with respect to land contest cases in said Cherokee Indian Nation; that said Commissioner of Indian Affairs affirmed the decision of the Commissioner to the Five Civilised Tribes awarding the lands described in plaintiffs' petition to the plaintiffs, but that this defendent further appealed from the decision of said Commissioner of Indian Affairs in said Cherokee Consolidated Contest cases numbered 1181 and 1182 to the Honorable Secretary of the Interior in conformity with the then existing law, and the regulations of the Department of the Interior with respect to appeals in said contest cases to the final and ultimate tribunal, to-wit, the Honorable, The Secretary of the Interior.

Twenty-fifth. That on the 31st day of May, 1907, the Honorable, the Secretary of the Interior, the tribunal of last and final resort in Cherokee land contest cases, rendered his decision in said Consolidated Cherokee Contest cases numbers 1181 and 1182, wherein the plaintiffs in this action were parties contestant, and the defendent in this action party contestee, involving the lands described in plaintiffs' petition, and by said decision reversed the prior decisions of the inferior tribunals, to-wit: The Honorable Commissioner of Indian Affairs and the Honorable Commissioner of the Five Civilized Tribes, and specifically awarded all of the lands described in plaintiffs' petition to the defendent in this action, to be and to comprise a portion of his allotment in the Cherokee Indian Nation; that a copy of said decision will be attached hereto, made a part hereof, and marked Defendent's Exhibit B.

27 Twenty-sixth. That thereafter, to-wit, on the 28th day of June, 1907, the parties contestant in Cherokee Allotment Contest cases numbers 1181 and 1182, filed their motion requesting the Honorable the Secretary of the Interior, to review said Depart-

mental decision of May 31, 1907, in said Consolidated Cherokee Allotment Contest cases on the ground:

"That said decision of the Department is not in accordance with the facts as shown by the records in said cases, nor with the law applicable to the cases under which the said contestants were and are entitled to judgment."

Twenty-seventh. That on the 16th day of August, 1907, the Honorable the Secretary of the Interior, the tribunal of last resort in contest cases of the character hereinbefore described, denied the motion filed by the parties contestant in said Consolidated Contest cases, to-wit, the plaintiffs in this action, a copy of which decision denying said motion for review, is attached hereto, made part hereof, and marked Defendant's Exhibit C.

Twenty-eighth. Defendant having been finally awarded the lands described in plaintiff's petition as a portion of his allotment in the Cherokee Indian Nation by the decision of said Secretary of the Interior, and having fully answered herein, prays judgment for the dismissal of this cause, for his costs laid out and expended herein, and for all other relief to which he may be entitled in equity and in good conscience.

VEASEY AND ROWLAND,
Attorneys for Defendant.

STATE OF OKLAHOMA,
Washington County, ss:

James Day being duly sworn on oath states that he is the defendant in the above entitled cause; that he had read the foregoing answer and is acquainted with the contents thereof, and that the same are true in substance and fact as he verily believes.

JAMES DAY.

Subscribed and sworn to before me this 11th day of September, 1908.

ERHET KEHRER,
Notary Public.

My commission expires June 25, 1910.

Form 31.

Department of the Interior.

Commissioner to the Five Civilized Tribes.

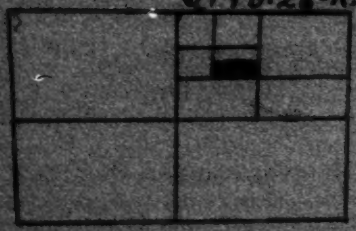
Certificate No. 11267.

Roll Number ——.
Cherokee Roll—Freedmen Roll.
D. 120.

Certificate of Homestead Allotment.

CHEROKEE LAND OFFICE,
MUSKOGEE, I. T., *Nov. 11th*, 1907.

T19N.-R.24-R.13



This certifies that James Day on May 27, 1904, selected the following described land, as a homestead, viz:

	Sec.	Town.	Range.
Sub-Division of S. /2 of S. E. /4 of N. W. /4 of.....	19	20	13

28 containing 20 acres more or less, as the case may be according to the United States survey thereof. Total appraised value of land described in this certificate $50.00.

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes.

D. H. S. 11/26/07.

Department of the Interior.

Commissioner to the Five Civilized Tribes.

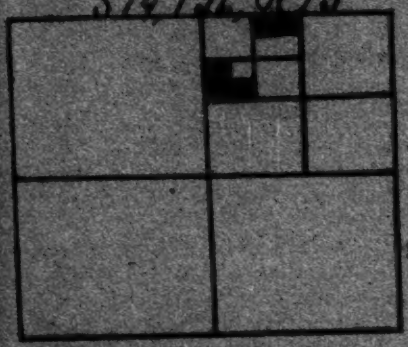
Certificate No. 14222.

Roll Number ——.
Cherokee Roll. Freedman Roll.
D. 120.

Certificate of Allotment.

CHEROKEE LAND OFFICE,
MUSKOGEE, I. T., *Nov.* 11, 1907.

S 19 T 21 R 13



This certifies that James Day on May 27, 1904, filed his selection of the following described land, viz:

Subdivision	Section.	Town.	Range.
Subdivision of S. E. 10 acres of Lot 2, E. 20 acres of W. 21.10 acres of Lot 2 N. /2 of N. E. /4 of N. W. /4.....	19	26	13

containing 50 acres more or less, as the case may be according to the United States survey thereof. Total appraised value of land described in this certificate $200.

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes.

D. H. S. 11/26/04.

This certificate is not transferable.

F. R. D. 316.

DEPARTMENT OF THE INTERIOR, WASHINGTON, *Aug.* 16, 1907.

J. W. H.

Cherokee Allotment Contest No. 1181.

ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee.

With which is consolidated—

Cherokee Allotment Contest No. 1182.

FANNIE D. ROSS, by ROBERT B. ROSS, Her Husband, Contestant,
vs.
JAMES DAY, Contestee.

Review.

19 The Commissioner of Indian Affairs.

SIR: Receipt is acknowledged of your office letter of July 30, 1907, forwarding motion for review of Departmental decision of May 31, 1907, in the Cherokee Allotment Contest case entitled Ross vs. Day.

In this motion which was filed June 28, 1907, with the Commissioner to the Five Civilized Tribes, it is contended "That said decision of the Department is not in accordance with the facts as shown by the records in said causes, nor with the law applicable to the cases under which the said contestants were and are entitled to judgment."

It does not appear from said motion that any material question of fact or law was overlooked by the Department in its decision of May 31, 1907. Therein reference is made to Departmental decisions of the same date in the Cherokee cases of Bible vs. White and Blakeney vs. Bishop.

In these three decisions, which really constitute one so far as the views of the Department are concerned respecting the right to select allotments in the Cherokee Nation by reason of ownership of improvements, the provisions of law applicable thereto whether found in tribal statutes or in the acts of Congress were carefully considered. It is believed that the conclusion reached in said decisions is just and in accordance with the law.

With the letter dated July 20, 1907, the attorney for the contestants filed the affidavits of J. H. Hill and Lucinda Hill, apparently for the purpose of securing a rehearing or to supplement the record heretofore submitted. If a rehearing was desired these affidavits should have been submitted with proper petition for that purpose within the time limit allowed for filing motions for a rehearing. If said affidavits were intended as supplemental evidence it must be held that they were improperly submitted. Even if they could now be made a part of the record this effect would be to confirm the conclusion heretofore reached.

The request that this cause be referred to the Attorney General for opinion is refused. The question decided in this and the two other cases referred to above is one which has been carefully considered and the Department has no doubt as to the correctness of its conclusion concerning the same.

The motion for review is hereby denied. The papers are returned herewith.

Very respectfully,

(Signed) GEORGE W. WOODRUFF,
Acting Secretary.

Endorsed on back as follows: No. 389. Robert B. Ross, et al., Plffs. vs. James Day, Dft. Answer. District Court, Washington County, Okla. Filed Sept. 11, 1908, John B. Churchill, Clerk. Veasey and Rowland, Attorneys at Law, Bartlesville, Okla. Entered.

That thereafter to-wit on the 11th day of September, 1908, the parties hereto filed in the District Court of Washington County, Oklahoma, their stipulation for reference, in words as follows:

30 In the District Court for the Second Judicial District of the State of Oklahoma, Sitting at Bartlesville, for Washington County.

Civil No. —.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner to the Five Civilized Tribes, and JAMES DAY, Defendants.

Stipulation for Reference.

This cause being of equitable cognizance and a jury hereby waived, it is agreed by the plaintiff, through his solicitor, Kenneth S. Murchison, and by the defendent, James Day, through his solicitor, Veasey and Rowland, (the complaint herein having been dismissed as to the defendent Wright) that this cause on issues of fact be referred to John H. Kane as referree to take the evidence and report all the evidence to this court on or before the 26th day of October, 1908, with his findings of facts, said referred to attach to his report, under his certificate, all the evidence and any and all exceptions and bills of exceptions before filed with him by either party. It is agreed that upon the coming in of said report with said record attached thereto under the certificate of the said referree the whole case upon question of both fact and law, upon the whole record may be submitted to the Court for its action thereon, upon such exceptions and motions as the parties considering themselves

aggrieved by the action and findings of the said referree may file, either before said referree or before the Court.

Made this — day of September, 1906.

KENNETH G. MURCHISON,
Solicitor for Plaintiffs.
VEASEY AND ROWLAND,
Solicitor for Defendant.

Endorsed on back as follows:

389. District Court, Washington County, Oklahoma. Robert B. Ross, Pl'ffs, vs. J. George Wright, Commissioner to the Five Civilized Tribes, and James Day, D'f't's. Stipulation for Reference. District Court, Washington County. Filed Sep. 11, 1906. John B. Churchill, Clerk. Entered.

That thereafter on the 12th day of September, 1906, the above case was referred in words as follows:

In the District Court for the Second Judicial District of the State of Oklahoma, Sitting at Bartlesville, for Washington County.

Civil No. —.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner to the Five Civilized Tribes, and JAMES DAY, Defendant.

31 *Order of Reference.*

The parties herein having filed their written agreement to refer this cause to John H. Kane, Esquire, of Bartlesville, Oklahoma, to take the evidence and report all of the evidence to this Court with his findings of fact, attaching to his report, under his certificate, all of the evidence and any and all exceptions and bills of exceptions taken before and filed with him by either party, the whole case upon both questions of fact and law on the entire record, as certified by the referree, to be submitted to this court for its action thereon, upon exceptions, motion and arguments as the parties may file and present respectively.

It is therefore ordered that this cause be, and it is hereby referred to John H. Kane, Esquire, of Bartlesville, Oklahoma, to take all the evidence and report the same to this Court on or before the 26-h day of October, 1906, unless further ordered upon the coming in of which the cause is set down for hearing at the next term of this Court after the filing of said report upon the whole record as provided for in the stipulation of solicitors upon such exceptions, motions and arguments as the parties may file and present respectively.

Ordered on this 12th day of September, 1906.

T. L. BROWN,
District Judge.

Endorsed on back as follows:
389. District Court Washington County, Oklahoma. Robert B. Ross, and Fannie D. Ross, Plffs. vs. J. Geo. Wright, Commissioner to the Five Civilized Tribes, and James Day, Dfts. Order of Reference. Entered.

Thereafter to-wit: on the 18th day of September, 1906, John H. Kane, referree agreed upon filed his oath in this Court in words and figures, following, to-wit:

In the United States Court, Sitting at Bartlesville.

Oath of Referree.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
JAMES DAY, Defendant.

John H. Kane, after being duly sworn, on his oath states, that he is the appointed referree in the above entitled case; that he will well and faithfully hear and examine the said cause and make just and true report therein, according to the best of his understanding.

JOHN H. KANE.

Subscribed and sworn to before me this 18th day of September, 1906.

JOHN B. CHURCHILL,
Clerk District Court.

Endorsed on back as follows:
389. Oath of Referree. Robert B. Ross and Fannie D. Ross vs. James Day. District Court, Washington County, Okla. Filed Sep. 18, 1906. John B. Churchill, Clerk. Entered.

32. That thereafter to-wit: On the 23rd day of September, 1906 the following proceedings were had before John H. Kane, referee in the city of Bartlesville, Washington County, Oklahoma, to-wit:

Before John H. Kane, Referee.

No. 389.

ROBERT B. ROSS, and FANNIE D. ROSS, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner, etc., and JAMES DAY, Defendants.

John H. Kane, appointed referee herein by the order of the Honorable Tom L. Brown, presiding judge of the Second Judicial District of the State of Oklahoma, having set for the taking of testimony this the 23rd day of September, 1906, proceeds to the same at the office of Kane and Burford, at Bartlesville, Oklahoma; the plaintiff

being represented in person and by attorney, Kenneth S. Murchison, and the defendant being present in person and by counsel, Messrs. Veasey & Rowland.

The plaintiff offers ROBERT B. ROSS, who being sworn, testifies as follows:

Defendant Day objects to the introduction of any evidence in this cause for the following reasons:

1. Because plaintiff's complaint does not state a cause of action.

2. Because there is a misjoinder of causes of action and a misjoinder of parties plaintiff herein.

3. Because the land in dispute has been determined by the Secretary of the Interior to be the allotment of the defendant by decision rendered by the Secretary of the Interior on the 31st day of May, 1907 and by the decision of said Secretary on the 16th day of August, 1907 denying a motion for a review of said decision of May 31st, the effect of which said several decisions is to make the facts found in said decision conclusive upon the parties thereto.

4. Because no evidence can be taken in this cause unless there are allegations of fraud in the taking of the testimony before the Department of the Interior, or unless there are allegations of mistake in the taking of said testimony specifically pointing out the mistake relied upon by the plaintiffs, neither of which allegations of fraud or mistake have been set out in plaintiff's complaint.

Counsel for plaintiff states that as to the exceptions of Counsel for the Defendants Numbers - and 2 said questions are res Judicata, having been decided by the District Court forme-ly having jurisdiction of said cause at Muskogee, on the 5th day of August, 1906.

As to the 3rd exception of Cou-sel for defendants, it is immaterial, irrevalent and does not affect this issue, and contains conclusions of law denied by the plaintiff of which this referee has no jurisdiction, and because plaintiff's Bill of Complaint sufficiently alleges facts to constitute a cause of action as finnal-y determined by the presiding judge of the third Judicial District of Oklahoma.

33 Therefore, counsel for plaintiff moves to strike from the record the exceptions of Counsel for Defendant.

Referee overrules motion of plaintiffs' Counsel to st-ike from the record the exceptions of defendant's Counsel.

To which plaintiffs except.

Defendant moves to strike from the record the statement of plaintiffs' Counsel in responce to defendant's objections to the introduction of any testimony on the ground that such statement in incompenent, irrevalent and immaterial.

The referee sustains the motion of the defendant's Counsel to strike from the record statements by Counsel for complainant.

To which plaintiffs except.

The referee over-rules the objections of the defendant to the introduction of any evidence, solely on the grounds that it is not within his jurisdiction to pass upon matters of law involved in this case.

To which defendant excepts.

Whereupon plaintiffs offer Robert B. Ross as witness for plaintiffs, who being duly sworn is offered as witness.

Defendant's same objection. Over-ruled. Exceptions.

Defendant further objects on the ground that the questioning is irrevalent, incompevent and immaterial and for the further reason that the decision of the Secretary of the Interior in regard to the land in controversy in conclusive as to the facts which are the basis of this cause of action.

Objections over-ruled. Exception.

Direct examination by KENNETH S. MURCHISON:

Witness states that his name is Robert B. Ross; that he is 63 years od age; that he resides in Tahlequah, Cherokee County, State of Oklahoma.

Q. Are you the Robert B. Ross who is one of the plaintiffs in this proceedings?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with Fannie D. Ross?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Is she married to you?

A. She is my wife.

Same objection. Over-ruled. Exception.

Q. What is your nationality?

A. My nationality is half Cherokee, under the rolls and according to the laws of the Commission to the Five Civilized Tribes.

(Counsel for plaintiffs offer here the certified copy of the enrollment of the witness, which will be marked Plaintiffs' Exhibit 1.

Same objection. Over-ruled. Exception.

Q. Is this a certified copy of your enrollment by the Commission to the Five Civilized Tribes?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Is the document that has just been testified to by you also a correct statement of the enrollment of Fannie D. Ross, your wife?

A. Yes, sir.

Same objection. Over-ruled. Exception.

34 (Counsel for plaintiffs moves that the referee finds as a fact every allegation in the complaint of the plaintiffs to be true, except those that have been specifically denied by the defendant in his answer.)

Same objection. Over-ruled. Exception.

Defendant moves to strike from the record this said motion for the reason that the same is improper, argumentive, incompetent, irrevalent and immaterial.

Referee withholds ruling until proper time.

To which plaintiffs exce-t.

To which plaintiffs exce-t.

Q. Are you a citizen of the Cherokee Nation?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. By what means are you a citizen of the Cherokee Nation?

A. I am a Cherokee by blood.

Same objection. Over-ruled. Exception.

Q. Is Fannie D. Ross a citizen of the Cherokee Nation?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. By what means is she a citizen?

A. She is by means of Cherokee blood.

Same objection. Over-ruled. Exception.

Q. Have you selected an allotment for yourself as a citizen of the Cherokee Nation?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Have you selected an allotment for your wife as a citizen of the Cherokee Nation?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you select as any part of your allotment any part of the N/2 of NE/4 of NW/4 and the SE/4 of SE/4 of NW/4 of Section 19, Township 26, Range 13, as a citizen of the Cherokee Nation?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. The lands described being North and East of the Indian base and Meridian according to the Survey of the United States Geological Survey. Is that correct?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Where is that land located?

A. It is located immediately south (will say south) of the Town of Bartlesville, about—between one and a half and two miles.

Same objection. Over-ruled. Exception.

Q. Is that land within what was formerly known as the Cherokee Nation?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. By what right do you claim this land as a part of your allotment?

Same objection. Over-ruled. Exception. Defendant further objects to the question for the reason that it calls for a conclusion of law. Over-ruled. Exception.

A. By virtue of the purchase from Mr. Keeler and the improvements made thereon.

Q. Did you also have the right to select allotment by virtue of your citizenship?

A. Yes, sir.

Same objection. Over-ruled. Exception.

35 Q. In the Cherokee Nation?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Who is Mr. Keeler?

A. He is an adopted citizen, or was.

Same objection. Over-ruled. Exception.

Q. What is his full name?

A. George B. Keeler, I believe.

Same objection. Over-ruled. Exception. Defendant moves to strike the question and answer from the records for the reason that the records of the Commissioner to the Five Civilized Tribes is the best evidence of the citizenship of Mr. Keeler.

Counsel for complainant suggests that the question hasn't anything to do with Mr. Keeler's citizenship in the Cherokee Nation, but was simply asked for identification.

Referee over-rules defendant's objection. Exception.

Q. What do you mean by an adopted citizen?

A. I mean by an adopted citizen——

Same objection. Over-ruled. Exception. Defendant further objects to said question for the reason that the same calls for a conclusion of law.

Counsel for plaintiffs suggest that he simply asks for the explanation of what is meant by the expression of "adopted citizen."

Same objection. Over-ruled. Exception.

A. The question of adopted citizenship is regulated by Cherokee law allowing a white man, a citizen of the United States or Foreign Nation to come into the Country and take out a license to marry a Cherokee citizen under the Cherokee law.

Same objection. Over-ruled. Exception.

Q. Are you familiar with the laws of the Cherokee Nation relating to improvements on the Public domain of that Nation?

Same objection. Over-ruled. Exception. Defendant further ob-

jects for the reason that the proper foundation for the question has not been laid and witness is not competent to testify in regard to the laws of the Cherokee Nation, and the same if not the best evidence.

Counsel for plaintiffs suggest that the question does not require any testimony from a witness as to any of the laws of the Cherokee Nation, but i- a question for the purpose of qualification in ascertaining the ability of the witness to testify on that question.

Referee sustains the objections of the Counsel for defendant.

Plaintiffs except.

A. Yes, sir.

Q. Who owned the improvements on the lands described in the Compalint of the plaintiff- on the 5th day of May, 1904?

Same objection. Over-ruled. Exception. Defendant Day further objects to the question for the reason that it calls for a conclusion of law. Over-ruled. Exceptions.

A. I did.

Q. What constituted the improvements you owned on the lands?

36 A. Well, the North twenty was between an acre and an acre and a half, as well as I can recollect, in cultivation.

Same objection. Over-ruled. Exception.

Q. Upon what part of that twenty was the cultivation?

A. It was the South half of the West ten.

Same objection. Over-ruled. Exception.

Q. Who was in possession of that land at the time you made application to allot?

Same objection. Over-ruled. Exception. Defendant further objects for the reason that same calls for a conclusion of law. Over-ruled. Exception.

A. I do not know positively.

Q. Now, what improvements was on that land before you obtained it from Keeler as you stated?

Same objection. Over-ruled. Exception. Defendant Day further objects to the testimony in regard to the purchase from Keeler for the reason that the Bill of Sale is the best evidence of said purchase. Objection over-ruled. Exception.

A. Well, there was that between an acre and an acre and a half of land in cultivation and fenced. It was about a five or six wire fence.

Q. How much of this land do you know was under fence?

A. About an acre and an acre and a half, approximately an acre and a half.

Same objection. Over-ruled. Exception.

Q. Did you file on this land, or apply to file on this land as soon

as you could be admitted to the Office of the Commission to the Five Civilized Tribes for the purpose?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you have any talk with the defendant, Day about filing on this land prior to May 5th, 1904, when Day filed on it?

A. I met Mr. Day on the 4th, the day before he filed and spoke to him, and asked him to meet me the next morning, and the next morning he didn't come around at all.

Same objection. Over-ruled. Exception.

Q. Did Day make any statements to you at that time about filing on this land?

A. No, sir.

Same objection. Over-ruled. Exception.

Q. Did he say to you that he had filed on the land in question?

A. No, I don't recall him saying anything about what he had filed on.

Same objection. Over-ruled. Exception.

Q. Did he make any claim to you of a right to file on said land?

A. No, sir.

Same objection. Over-ruled. Exception.

Q. What did you do when you went to the office of the Five Civilized Tribes with regard to this land?

A. I filed a contest against Mr. Day. He had already filed on it.

Same objection. Over-ruled. Exception.

Q. Did you also file a contest for the plaintiff, Fannie D. Ross?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Was that contest of your- ever decided by the Commission to the Five Civilized Tribes?

A. Yes, sir.

37 Same objection. Over-ruled. Exception.

Q. Did you ever get a notice from the Commissioner to the Five Civilized Tribes of a decision in that case?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Was the matter ever decided by the Commissioner of Indian Affairs at Washington?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you ever get a notice of this decision?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. I will show you some papers and ask you if these are the notices you received as to those decisions?

A. Yes, sir.

Same objection. Over-ruled. Exception.

(Plaintiff offers in evidence the papers shown witness, and marks same Plaintiffs' Exhibit- 2 & 3.)

Same objections. Over-ruled. Exceptions. Defendant further objects to the introduction of Plaintiffs' Exhibit- 2 and 3 in evidence:

1. For the reason that the same are not authenticated as required by law.

2. Because said decisions, or either of them, are not the final decisions rendered therein.

Over-ruled. Exceptions.

Q. Did you ever receive any information from the Commissioner of the Five Civilized Tribes or from the Interior Department with regard to your case?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you ever receive otherwise than from the Dawes Commission copies of the decision of the Secretary of the Interior in this matter?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. How did you get that?

A. I got it,—one from Mr. Pollock, who at that time I understand was the Chief Clerk in the Attorney General's Office for the Department of the Interior.

Same objection. Over-ruled. Exception.

Q. Where was that delivered to you?

A. At his office in Washington on the 31st day of May, 1907.

Same objection. Over-ruled. Exception.

Q. Is this the paper that was delivered to you by Mr. Pollock as the decision of the Interior Department?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. How many sheets are there?

A. There are six.

Same objection. Over-ruled. Exception.

Q. What is the color of that paper?

A. I would call it yellow.

Same objection. Over-ruled. Exception.

Q. What is the consistency of that paper?
A. Well, I would call it a tis-ue paper.

Same objection. Over-ruled. Exception.
(Counsel offers tis-ue paper copy, referring to it as plaintiffs' Exhibit 4.)

Same objection. Over-ruled. Exception.

38 WITNESS: I received it about four minutes after the decision was rendered.

Defendant Day objects to the introduction of plaintiffs' Exhibit 4 in evidence for the reason that the same is not authenticated as required by law. Overruled. Exception.

Q. Mr. Ross, have you ever made any investigation at the Commission to the Five Civilized Tribes as to the improvements of Defendant Day in Section 19?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. I will show you a paper here which purports to be a certified copy of the improvement plat of that Section. Where did you get that, Mr. Ross?
A. I got it from the Commission.

Same objection. Over-ruled. Exception.

Q. When?
A. Yesterday.

Same objection. Over-ruled. Exception.

Q. Does that plat show the improvements in that section of the Defendant Day?
A. Well, I am unable to say positively as to the improvements of Mr. Day on this map.

Same objection. Over-ruled. Exception.

Q. Does it show his name?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Now around his name are there any lines to show or to indicate what improvements he has there?

Same objection. Over-ruled. Exception. And the Defendant further objects for the reason that the same does not refer to any date which would make said improvements a specified issue in this cause, and is incompetent, irrelevant, and immaterial.
Counsel for plaintiffs suggest that defendant Day by his answer specifically puts in issue the quarter mile, usufruct or limit of citizens of the Cherokee Nation, and that this question as a question of fact is most material and relevant.
Objection over-ruled. Exception.

A. According to the plat here——

Q. Have you that plat before you?

A. Yes, sir. According to the plat, why, Mr. Day is nearly one-half a mile, if not over, from this land, his improvements.

Same objections. Over-ruled. Exception. Defendant moves to strike answer as irrelevant, immaterial and incompetent.

Counsel for plaintiffs think it unnecessary to repeat the remarks above.

Objection over-ruled. Exception.

Q. You say that it — one half a mile or over from the lands in question. It is your understanding that the smallest devision there is what?

A. The smallest sub-division on that plat is ten acres.

Same objection. Over-ruled. Exception.

Q. How many ten acres, if you know, makes a quarter of a mile?

A. I do not understand the question.

Same objection. Over-ruled. Exception.

Q. How many ten acres make a quarter of a mile?

A. Forty acres, four tens, I think would make a quarter of a mile.

Same objections. Over-ruled. Exception.

Q. How many ten acres though has it got?

A. Two.

Same objection. Over-ruled. Exception.

39 Q. How many ten acres are between the nearest point of improvements of James Day on this plat that you have before you, and the nearest ten acres that you claim?

Objected to by defendant for the reason that the plat is the best evidence. Over-ruled. Exception.

A. Well, if I am not mistaken, there is forty acres between them, four tens.

Same objection. Over-ruled. Exception.

Q. If the S. E. /4 of the S. E. /4 of the N. W. /4 is the nearest ten, how many ten acres are there between Jim Day's improvements and that ten?

A. According to the plat here, there are two tens and a fraction about a third of a ten.

Same objection. Over-ruled. Exception.

Q. The nearest piece of land to that you claim as your allotment is not within a quarter of a mile of the improvements of Jim Day as show- by that improvement plat?

Same objection. Over-ruled. Exception. For the further reason that the question is leading. Over-ruled. Exception.

A. No, it is not within a quarter of a mile.

(Plaintiffs' Counsel offers the certified copy of the improvement plat to be marked Plaintiffs' Exhibit 5.)

Defendant objects to the introduction in evidence of said plat as plaintiffs' Exhibit 5 for the reason that the same is irrelevant, immaterial and incompetent and not authenticated by the proper authority, and not the best evidence of the facts intended to be proved.

(Counsel for plaintiffs states that the defendant by his own testimony, by his own answer, places the question as to the nearness or farness of said land to his improvements in issue; that the document offered is a certified copy made by the Commissioner to the Five Civilized Tribes who is the officer of the United States having custody of these documents.)

Objections over-ruled. Exception.

Q. Now did you get any other record from the Commissioner to the Five Civilized Tribes at the time that you got this improvement plat from him?

A. Yes, sir. I got a copy (certified) of our enrollment number, myself and my wife.

Same objection. Over-ruled. Exception.

Q. Do you get any other papers? I mean, did you get any copy of the testimony in connection with——

Q. Why, yes, I got one, copy.

Same objection. Over-ruled. Exception.

Q. Now, is this the document to which I refer?

A. Yes, sir, that is the statement of Mr. Day.

Same objection. Over-ruled. Exception.

Q. That is, it purports to be a certified copy of Mr. Day's statement May 5th, 1904? Does it appear from that copy that you have had that sworn to by Mr. Day.

Same objection. Over-ruled. Exception. Defendant further objects for the reason that the instrument itself is evidence of it-contents. Objection sustained.

(Plaintiffs offer as evidence the certified copy referred to to be marked Plaintiffs' Exhibit 6, showing the sworn testimony of James Day on May 5, 1904, in which he claims to own the improvements on the land in controversy.)

Same objection. Over-ruled. Exception. Defendant further objects to the introduction of Plaintiffs' Exhibit 6 for the reason that the same is incompetent, irrelevant and immaterial and for the further reason that the same has not been authenticated by the proper officer as is required by law.

40 (Counsel for plaintiffs states that the answer of the defendant specifically places in issue the question as to whether or not the defendant on the 5th day of May, 1904, swore to the Commissioner to the Five Civilized Tribes that he owned the improvements on the lands in question; that the certified copy offered is certified to by J. George Wright, Commissioner to the Five Civilized

Tribes, who is the officer having custody of the records relating to allotments in the Five Civilized Tribes.)

Objection over-ruled. Exception.

Q. Isn't there any thing else you know in regard to this matter that you desire to state to the referee?

A. I do not know of anything.

Same objections. Over-ruled. Exception.

Cross-examination.

By JAMES A. VEASEY:

Q. Mr. Ross, do you have any personal knowledge of any improvements being on that part of the land involved in this suit on the first day of March, 1904, excepting that small portion of fencing and the small tract of cultivated land referred to by you in the S. W. corner of the N. W./4 of N. E. /4 of N. W./4 of Section 19, Twp. 26 North, Range 13 East, I am asking for your knowledge on that subject on the first day of March, 1904.

A. Well, there was nothing else that I know of with the exception of short bits of wire here and there on the trees surrounding that land.

Q. When had you seen that land prior to the first day of March, 1904?

A. I saw it along a month or two before that.

Q. Was this wire there?

A. I say two months, I saw it quite a little time before that time.

Q. There was no portion of this land in cultivation other than the small tract of an acre or an acre and a half that you referred to?

A. No, sir. There were no improvements on it at all.

Q. The only improvements you saw on the land a month or six weeks before the first day of March, 1904, were a few strands of wire here and there?

A. Yes, sir.

Q. Was that wire on the posts?

A. No, sir. On the trees.

Q. Was it tacked from tree to tree?

A. You understand me. I said that it seemed to have been cut away and just short bits of it tacked on the trees.

Q. When was the first time you saw this land, Mr. Ross?

A. Now, I just can't exactly tell you the date.

Q. What year?

A. It was my recollection 1904—early that year.

Q. What did you pay Mr. Keeler for the improvements which you claim you purchased from him on the land in contest?

Plaintiffs object to question as immaterial.

Objections over-ruled. Exception.

A. As I stated before Mr. Keeler deeded me that property down there at $100.00, but it was just given to me, and was so stated in my previous statement.

Q. You mean to say that Mr. Keeler gave you these improvements?

A. Yes, sir, gave them to me without any consideration.

COUNSEL FOR DEFENDANT: That will do.
COUNSEL FOR PLAINTIFF: That will do.
Witness dismissed.

41 The plaintiffs offers JAMES W. DUNCAN as witness for plaintiff, who being duly sworn, is offered as witness.

Defendant James Day objects to the introduction of any evidence in this cause for the following reasons:

1. Because plaintiffs' complaint does not state a cause of action.

2. Because there is a misjoinder of causes of action and a misjoinder of parties plaintiff herein.

3. Because the land in dispute has been determined by the Secretary of the Interior to be the allotment of the defendant by decision rendered by the Secretary of the Interior on the 31st of May, 1907, and by the decision of the said Secretary on the 16th day of August, 1907, denying a motion for a review of said decision of May 31st, the effect of which said several decisions is to make the facts found in said decision conclusive upon the parties thereto.

4. Because no evidence can be taken in this cause unless there are allegations of fraud in taking of the testimony before the Department of the Interior, are unless there are allegations of mistake in the taking of said testimony specifically pointing out the mistake relied upon by the plaintiffs, neither of which allegations of fraud or mistake have been set out in plaintiffs' complaint.

Counsel for plaintiffs states that as to the exception of Counsel for defendant Numbers one and two, said questions are res adjudicata, having been decided by the District Court formerly having jurisdiction of this cause at Muskogee on the 5th day of August, 1908.

As to the third exception of Counsel for defendant it is immaterial, irrelevant and does not affect this cause, and contains conclusions of law denied by the plaintiffs and of which the referee has no jurisdiction, and because plaintiffs' Bill of Complaint sufficiently alleges facts to constitute a cause of action as finally determined by the presiding judge of the Third Judicial District of Oklahoma.

Therefore, Counsel for plaintiffs moves to strike from the records the exceptions of defendant's Counsel.

Referee over-ruled motion of plaintiffs' Counsel to strike from the records the exceptions of Defendant's Counsel.

To which plaintiffs except.

Defendant moves to strike from the records the statement of Plaintiffs' Counsel in response to defendant's objections to the introduction of any testimony on the ground that such statement is incompetent, irrevalent and immaterial.

The referee sustains the motion of defendant's Counsel to strike from the record statement by Counsel for complainant.

To which plaintiffs except.

The referee over-rules the objection of the defendant to the introduction of any evidence, solely on the ground that it is not within his jurisdiction to pass upon matter of law involved in this case.
To which defendant excepts.

Whereupon plaintiffs offer JAMES W. DUNCAN as witness for plaintiffs, who being sworn, testifies as follows:

Direct examination.

By KENNETH S. MURCHISON:

Q. Your name is James W. Duncan?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. How old are you?
A. About forty-seven.

Same objection. Over-ruled. Exception.

Q. Where do you live?
A. At Tahlequah, Oklahoma.

Same objection. Over-ruled. Exception.

42 Q. What county?
A. Cherokee County, Oklahoma.

Same objections. Over-ruled. Exception.

Q. What is your national-y?
A. I am a Cherokee Indian.

Same objection. Over-ruled. Exceptions.

Q. Are you a citizen of the Cherokee Nation?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. What is your particular profession, if you have any?
A. Surveying.

Same objection. Over-ruled. Exception.

Q. You are a surveyor?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Do you know Robert B. Ross?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Do you know Fannie D. Ross?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Do you know James Day?

A. Yes, sir. I am only slightly acquainted with him. I know him when I see him.

Same objection. Over-ruled. Exception.

Q. If it is within your knowledge, what is the national-ty of Robert B. Ross and Fannie D. Ross?

Same objection. Over-ruled. Exception. Defendant further objects for the reason that the records of the Commissioner to the Five Civilized Tribes is the best evidence. Over-ruled. Exceptions.

A. Part Cherokee.

Q. Do you know of your own knowledge what is the status of James Day is as to citizenship in any of the Five Civilized Tribes?

Same objection. Over-ruled. Exception. Defendant further objects for the reasons that the records of the Commissioner to the Five Civilized Tribes is the best evidence. Over-ruled. Exceptions.

Q. Now, of your own knowledge?

A. I only understand, I do not know.

Same objections. Over-ruled. Exception.

Q. Are you acquainted with the S. E./4 of the S. E. /4 of the N. W./4 of Section 19, Twp. 26, Range 13?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. And the N./2 of N. E./4 of N. W./4 of the same section and range and township?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. What knowledge if any have you ever had with regard to that land?

A. I surveyed it out about the first day of March, 1904.

Same objection. Over-ruled. Exception.

Q. For whom did you do that work?

A. I was under the employ, as I understood it at the time, of Charlie Ross.

Same objection. Over-ruled. Exception.

Q. Who is Charlie Ross?

A. He is the son of Robert B. Ross.

Same objection. Over-ruled. Exception.

Q. Robert B. Ross, one of the plaintiffs in this cause?

A. Yes, sir. Robert B. Ross and Fannie D. Ross.

Same objection. Over-ruled. Exception.

Q. Now, what did you assist in doing in addition to the surveying of those tracts of land at that time?

A. We set posts around there on the corner, and also along about every forty or fifty yards along the line.

Same objection. Over-ruled. Exception.

43 Q. Where those posts set on the line?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Where those posts set so that they could be observed by a casual passer-by?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. How far from the bridge was that South ten acres that you surveyed?
A. It was about the East line of it was somewhere about seventy-five yards from the West of the bridge,—about that.

Same objection. Over-ruled. Exception.

Q. Who assisted in that survey and in the setting of those posts?
A. Dr. Ross and Hugh Morris.

Same objection. Over-ruled. Exception.

Q. And was ther- any other persons?
A. I don't think there was any other. There was another man there cutting posts at the time. I do not recall if he helped us in the survey. I do not believe that he did.

Same objection. Over-ruled. Exception.

Q. Who was that, do you recall the name?
A. I do not recall the name.

Same objection. Over-ruled. Exception.

Q. Did you see any other persons that those that were assisting you there at that time during the time you were doing the work?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Who did you see?
A. There was Mr. Hill, and Mr. Beard, I believe the gentleman's name was. Mr. Day came along, I think dur-ng the work.

Same objection. Over-ruled. Exception.

Q. Who is Mr. Day, is he the defendant in this cause as you understand it?
A. Yes, he is as I understand it.

Same objection. Over-ruled. Exception.

Q. He came along while you were at work.
A. Yes, sir he passed.

Same objection. Over-ruled. Exception.

Q. Did you have any conversation with Mr. Day at that time about what you were doing.

A. I think I asked him w-ere a corner was. That was my conversation if I had any. I am not certain about that.

Same objection. Over-ruled. Exception. Defendant Day further objects that it is absolut- incompetent. Over-ruled. Exception.

Q. Could Mr. Day from the position where he was see what you were doing if he looked.

Same objection. Over-ruled. Exception. Further objects for the reason that the witness is incompetent to answer the question. Over-ruled. Exception.

Q. Answer that question.
A. I think he could.
Q. About how many posts if you can estimate it, were put around the Sout- ten and the North twenty acres by you and those who were with you?
A. Why, I expect about thirty or forty. We drove them along. We just cut them and drove them.

Same objection. Over-ruled. Exception.

Q. Were those posts marked in any way so that they could be noticed?
A. They were blazed, and we cut them out of saplings along the side of the line and blazed them on both sides.

44 Same objection. Over-ruled. Exception.

Q. Now, Mr. Duncan, I will ask you this question,—if you had a right to take an allotment of Cherokee lands and were looking for lands that were not occupied to be by you selected for your allotment, would you have noticed the posts that you have described as indicating the first steps of a Cherokee to improve those lands?

Objected to be the defendant for the reason that the proper foundation for the question had not been made, and for the reason that the question calls for a conclusion of law under the Cherokee law and the laws of the United States and for the further reason that the question calls for an opinion and not a statement of facts.

(Counsel for plaintiffs states that this witness by his testimony has shown that he is an educated man, a professional surveyor, is a Cherokee by blood, and competent to testify as to whether or not he would be put on notice by the evidence of an intention to specifically improve his land, shown by the improvements placed there as described by the witness.)

Objection sustained. Exception.

Q. Now, Mr. Duncan you may answer.
A. I would.

Same objection. Over-ruled. Exception.

Cross-examination.

By Mr. JAMES A. VEASEY:

Q. Mr. Duncan, you say that you live at Tahlequah, Okla.?
A. Yes, sir.
Q. You were living at Tahlequah, on the first day of March, 1904?
A. Yes, sir. I might have been in the country adjacent to Tahlequah. Yes, I was living within a few miles of Tahlequah.
Q. About what time in the neighborhood of March, 1, 1904 did you come to Bartlesville?
A. About one or two days before that.
Q. With whom did you come?
A. I came with Hugh Morris. Dr. Ross called me out here but he came the day before I did.
Q. What did Mr. Ross say to you when he called you up within the neighborhood of Bartlesville?

Plaintiff objects as immaterial. Objection overruled. Exception.

A. He wanted me to do some surveying for him up here.
Q. Did he say about how many acres he wanted you to survey?
A. I do not think he did. He didn't indicate just hoe much; he didn't tell me exactly.
Q. Did he say how many days you would be so ingaged?
A. No, sir, he only said prehaps a few days.
Q. Did he set out how many heirs he wanted to provide allotments for?
A. No, sir.
Q. Did he say that he wanted to provide allotments for any heirs?

A. Objection by plaintiffs as utterly immaterial. Over-ruled. Exception.

A. My understanding at that time was, that he was looking out for allotments for the Ross family, he didn't tell me exactly for whom.

45 Q. Did he say that the land involved in this suit is devided into two separate tracts?
A. Yes, sir.
Q. One twenty acres in the North and one ten acres almost South of that?
A. Yes, sir.
Q. About what time of day March 1st, 1904 as testified by you did you go upon either of these tracts of land?
A. It was in the forenoon, we went up about 10 o'clock.
Q. About what time?
A. About ten o'clock.
Q. To which portion of this land did you go, the North twenty or the South ten?
A. My recollection is that we run the South ten firs. It might have been in the afternoon; we run the South ten in the morning, I think. I am not sure we run the ten first.

Q. You mean you don't remember whether it was the first or the second?

A. No, sir. We first went around the South ten, around three sides of it.

Q. And the next morning you went around the North twenty?

A. Yes, that is my impression.

Q. What improvements Mr. Duncan, did you observe on this South twenty when you went there that afternoon?

A. The South ten you mean?

Q. The South ten the afternoon of March 1? Where there any improvements there at all?

A. No, sir.

Q. What improvements if any did you notice on the North twenty on the morning of March 2nd when you first went there?

A. There were no improvements, except on the North ten in the South-west corner, in the field I understood, belonged to Mr. Johnson, or Keeler prehaps.

Q. That improvement in the South west quarter embraced about an acre of cultivated land, did it not, and such part of a wire fence together with contiguous lands?

A. Yes, sir.

Q. Ther- is contiguous lands outside of this twenty acres which is in cultivation?

A. Yes, sir.

Q. Now state exactly what improvements Dr. Ross, Hugh Morris and yourself placed upon this South ten acres the afternoon of March 1st?

A. We put about three posts on each corner. That is started out the line, set a corner post and set one on two nearby, starting on each of the lines each direction, then we would set a stake about every fifty to fifty-five yards along, blazed and marked out the line.

Q. Was there any underbrush on that South ten at the time?

A. A little bit, not much.

Q. Was it timbered?

A. Yes, sir.

Q. Was the North twenty timbered also outside of the cultivated acre?

A. Yes, sir.

Q. Was there much underbrush in the North twenty?

A. Some underbrush, not much.

Q. You testified before the Dawes Commission that these so called posts were saplings about half as big around as a man's arm and about four feet long, and were cut on the ground and stuck into the ground at the places marked by you?

A. Yes, sir.

46 Q. You say that they were some fifty to seventy-five yards apart?

A. Something like that, about forty or fifty. No wire was strung on these posts.

Q. Now was practically the same thing done on the North twenty on the morning of March 2nd?

A. Yes, sir.

Q. Posts about the same distance apart and was of about the same character?
A. Yes, sir. But on that morning Dr. Ross had a man cutting posts there.
Q. Were they a heavier post?
—. Yes, sir. They were a heavier post.
Q. There was no wire placed on those posts?
A. Not up to the time I left that day.

Redirect examination.

By KENNETH S. MURCHISON:

Q. Mr. Duncan what did you do with regard to the underbrush that was on the land between these points?
A. We cut the line out so we could see thoroughly.

Same objection. Over-ruled. Exception.

Q. Then standing at one corner you could see down the whole line, 600 feet?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Previous to setting these posts were there any improvements on either one of those tracts of land, except the cultivated land and the fencing you described?
A. No, sir.

Same objection. Over-ruled. Exception.

Recross examination.

By JAMES A. VEASEY:

Q. Mr. Duncan, you stated in your cross examination before the Deeds Commission that at the time you were putting these posts around the South ten that you observed James Day and his wife with a wagon on or near the land with some wire in the wagon, did you not?
A. I think prehaps I did.

Redirect examination.

By KENNETH S. MURCHISON:

Q. Did you see Jim Day on the West side or East side of the river at that time? Now, do you recall at this time whether you saw him on the west or east side?

Same objection. Over-ruled. Exception.

A. My recollection was that it was on the west side of the river. He came from the east side of the river.

Recross-examination.

By JAMES A. VEASEY:

Q. Mr. Duncan, where were you doing the work that you were engaged in upon which side of the river?
A. You mean at the time we saw——
Q. Yes, at the time you saw Jim Day and his wife?
A. I do not recall whether we were in the act of surveying at the time we saw Jim Day.
Q. It was before the posts were put in there that you saw Jim Day and his wife? ?
A. That is my recollection.
Q. As a matter of fact, it was the morning of the first, that you were there, was it not, Mr. Duncan?
A. I hardly recollect whether it was the first that we saw Jim Day on the first day, it is not clear in my mind.

Redirect examination.

By KENNETH S. MURCHISON:

Q. Where did you get your starting point to survey that land?
A. At the one half a mile rock on the south line of this section.

47 Same objection. Over-ruled. Exception.

Q. Is that west or east of the river?
A. It is east.

Same objection. Over-ruled. Exception.

Q. Do you recall whether or not you were surveying that line when you saw Jim Day?
A. I think that we were surveying that line. However, we began at half mile rock south and chained ten chains east and then went one half a mile north.

Same objection. Over-ruled. Exception.

Q. To what point in the section did you go in that line? From the point one half mile north you went ten chains west which brought you to the center of the section?
A. Yes, sir.

Same objection. Over-ruled. Exception.
Counsel for plaintiff: That will do.
Counsel for defendant: That will do.
Witness dismissed.

Plaintiffs offer E. A. BEARD as witness for plaintiffs, who being duly sworn was offered as witness.

Defendant James Day objects for the following reasons:
1. Because plaintiffs' complaint does not state a cause of action.

2. Because there is a misjoinder of causes of action and a misjoinder of parties herein.

3. Because the land in controversy has been determined by the Secretary of the Interior to be the allotment of the defendant by decision rendered by the Secretary of the Interior on the 31st day of May, 1907 and by the decision of the said Secretary on the 15th day of August, 1907 denying a motion for a review of said decision of May 1st, the effect of which said several decisions is to make the fact found in said decision conclusive upon the parties thereto.

4. Because no evidence cand be taken in this case unless there are allegations of fraud in the taking of the testimony before the department of the Interior, or unless there are allegations of mistake in the taking of said testimony specifically pointing out the mistake relied upon by the plaintiffs, neither of which allegations of fraud or mistake have been set out in plaintiffs' complaint.

Counsel for plaintiffs states that as to the exceptions of the Counsel for the defendant Numbers 1 and 2 said questions are res judicata, having been decided by the *the* District Court formerly having jurisdiction of this cause at Muskogee on the 5th day of August, 1908.

As the *the* third exception of the Co-nsel for the defendant, it is immaterial, irre*val*ent and does not effect this issue, and contains conclusions of law denied by the *by the* plaintiff of which the referee has no jurisdiction, and because plaintiff's Bill of Complaint sufficiently alleges facts to constitute a cause of action as finnal-y determined by the presiding Judge for the Third Judicial District of Oklahoma.

Therefore, Counsel for the plaintiffs moves to strike from the records the exceptions of the defendant's counsel.

48 Referee over-rules motion of plaintiffs' Counsel to strike from the records the exceptions of defendant's counsel.

To which plaintiffs except.

Defendant moves to strike from the record the statement of plaintiffs' Counsel in response to defendant's objection to the introduction of any testimony on the ground that such statement is incompetent, irre*val*ent and immaterial.

The referee sustains the motion of the defendant's Counsel to strike from the record statement by Counsel for complainant.

To which plaintiffs except.

The referee over-rules the objections of the defendant to the introduction of any evidence, solely on the ground that it is not within his jurisdiction to pass upon matters of law involved in this case.

To which defendant excepts.

Whereupon plaintiffs offer E. A. Beard as witness for plaintiffs who being sworn is offered as witness.

Defendant's same objection. Over-ruled. Exception.

Defendant further objects on the ground that the questioning is ire*val*ent, incompetent and immaterial and for the further reason the decision of the Secretary of the Interior in regard to the land in controversy is conclusive as to the facts which are the basis of this cause of action.

Objection over-ruled. Exception.

Direct examination.

By KENNETH S. MURCHISON:

Q. State your name.
A. E. A. Beard.

Same objection. Over-ruled. Objection.

Q. How old are you, Mr. Beard?
A. Fifty-six years old, yesterday.

Same objection. Over-ruled. Objection.

Q. Where do you live?
A. I live two miles South and three miles east of Bartlesville.

Same objection. Over-ruled. Exception.

Q. Where did you li-e about the first day of March, 1904?
A. Well, four years ago, I lived on what is known as the Gilstrap farm.

Same objection. Over-ruled. Exception.

Q. Well, how far and in what direction is that farm from Bartlesville?
A. It is nearly south, a little east.

Same objection. Over-ruled. Exception.

Q. About how far?
A. About six miles, nearly due south.

Same objection. Over-ruled. Exception.

Q. Do you know Dr. C. M. Ross?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you know Dr. C. M. Ross about the first day of March, 1904? Did you see him about that time?
A. Well, I can't remember the date.

Same objection. Over-ruled. Exception.

Q. It was along in the Spring of 1904?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you do any work for him about that time?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. What did you do for him?
A. I hauled some posts for him.

Same objection. Over-ruled. Exception.

Q. To what place did you haul these posts?
A. I left them at the place where Mr. Bixler lived, on the Johnson farm, that was where Mr. Ross wanted me to leave them. He

told me to leave part of them. I couldn't find Dr. Ross and the surveyor was gone.

Same objection. Over-ruled. Exception.

49 Q. Do you know anything about the land in controversy in this suit?

A. No, I don't.

Same objection. Over-ruled. Exception.

Q. You don't know anything about the suit of Robert B. Ross vs. James Day?

A. Yes, sir. I know about that suit. Up to that time I do not know where the controversy is, or anything about it.

Same objection. Over-ruled. Exception.

Q. Did you haul any posts for Dr. Ross on or about the first day of March, 1904 to pu- around some land?

A. Now then I may be mistaken in the name, it was that gentleman right there (indicating) I hauled the posts for.

Same objection. Over-ruled. Exception.

Q. Now was that where those posts were put up at that time?

A. They was put up at that time. That is all I know anything about. I don't know what did become of the posts, I left them up in Mr. Johnston's yard.

Same objection. Over-ruled. Exception.

Q. How far is the place where you hauled the posts to, from this land? About how far? About a quarter of a mile from the place?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Where you there when Dr. Ross, the son of Colonel Robert B. Ross, the man for whom you hauled the posts, and some other men were putting up some posts on that land?

A. I don't know anything about that.

Same objection. Over-ruled. Exception.

Cross-examination.

By JAMES A. VEASY:

Q. Mr. Beard, how long have you lived in the locality of the land which is in dispute between Mr. Ross and Jimmy Day.

A. About seventeen years.

Q. How long have you known Jimmy Day?

A. I have known him for about eighteen years, I think.

Q. You know where the land is, don't you?

A. Yes, sir, I know where it is.

Q. You know the land that these people were disputing about, don't you.

A. Yes, sir.

Q. Do you know anything about Jimmy Day claiming that land

or cutting down timber on it for fuel and fence posts any time within the last seventeen years?

A. It was always counted as the Jim Day farm.

Q. Did you ever know of Jim Day cutting there, or doing any clearing?

A. Yes, he cut timber there in the bottom.

Q. And by the bottom you mean the river bottom including this thirty acres?

A. It is the tract, as I understand it, that lays east of the place that Mr. Johnston used to own east of the old Johnston and Keeler farm and west of the river.

Q. West of the river?

A. Yes, sir.

Q. That bottom right in there?

A. Yes, sir.

Q. That was where you saw him cutting timber and the ownership of which he claimed?

A. Yes, sir.

Redirect examination.

By KENNETH S. MURCHISON:

Q. Did you ever see any fence around that land?

A. Yes, sir. There was some fence right along next to the river there.

Same objection. Over-ruled. Exception.

Q. Did you ever know who put that fence there?

50 A. No, sir. I don't know anything about it.

Same objection. Over-ruled. Exception.

Q. You don't know whether Jim Day put that fence up there?

A. I don't know who put it up.

Same objection. Over-ruled. Exception.

Q. Did you ever see any other man cutting timber on this land?

A. Not thot I know of particularly. Well, I have too. I saw Mr. Day's son and some young fellows cutting timber there.

Same objection. Over-ruled. Exception.

Q. Did you ever see Jim Day cutting any timber on the SE¼ of SE¼ of that section?

Same objection. Over-ruled. Exception. Defendant further excepts to question as immaterial, incompetent and irrelevant. Over-ruled. Exception.

A. I don't know just how the figures run. I don't remember the land where the timber was. I saw him cutting the timber.

Same objection. Over-ruled. Exception.

Q. Did you ever *sell* James Day cutting any timber on the N½ of the NE¼ of NW¼ of Section 19?

Same objection. Over-ruled. Exception. Defendant further objects for the reason that the witness is being instructed by plaintiff.—the witness being plaintiff's witness the questioning is leading and suggestive.

Objection sustained. Exception.

Q. Do you know whether Jim Day ever cut any timber on any of these tracts of lands described in this complaint?

A. Now, if you will give me a piece of paper, I can show you pretty near where he was cutting.

(Plat produced and shown witness.)

Between the corner of Johnston's field and the bridge.

Same objection. Over-ruled. Exception.

Q. Now, Mr. Beard, do you know of your own knowledge that Jim Day has actually cut timber?

Same objection. Over-ruled. Exception. Defendant further objects for the reason that the question calls for a conclusion of law. Objection over-ruled. Exception.

A. Why——

Q. That can be answered by yes or no. If you know answer yes, if not, no.

A. I don't know anything about it.

Q. We wanted to know whether you knew, that is all.

COUNSEL FOR PLAINTIFFS: That is all.

COUNSEL FOR DEFENDANT: That is all.

Witness dismissed.

Plaintiffs offer as witness HUGH M. MORRIS.

Defendant James Day, objects to the introduction of any evidence in this cause for the following reasons:

1. Because plaintiffs' complaint does not state a cause of action.

2. Because there is a misjoinder of causes of action and a misjoinder of parties, herein.

3. Because the land in dispute has been determined by the Secretary of the Interior to be the allotment of the defendant by decision rendered by the Secretary of the Interior on the 31st day of May, 1907, and by the decision of the said Secretary on the 16th day of August, 1907 denying a motion for a review of said decision of May, 31st, the effect of which said several decisions is to make the facts found in said decision conclusive upon the parties thereto.

4. Because no evidence can be taken in this cause unless there are allegations of fraud in the taking of the testimony before the Department of the Interior, or unless there are allegations of mistake in the taking of said testimony specifically setting out the mistake relied upon by the plaintiffs, neither of which allegations of fraud or mistake have been set out in plaintiff's complaint.

Counsel for plaintiffs states that as to exceptions of Counsel for

defendant Numbers 1 and 2, said questions are res judi-
51 cata, having been decided by the District Court formerly having jurisdiction of this cause at Muskogee on the fifty day of August, 1908.

As to the third exception of Counsel for defendant, it is immaterial, irrelevant and does not affect this cause, and contains conclusions of law denied by the plaintiffs and of which the referee has no jurisdiction, and because plaintiff's Bill of Complaint sufficiently alleges facts to constitute a cause of action as finaal-y determined by the presiding judge of the third Judicial District of Oklahoma.

Therefore, Counsel for plaintiffs moves that the exceptions of Counsel for defendant be stricken from the record.

Referee over-rules motion of plaintiffs' Counsel to strike from the records the exceptions of defendant's Counsel.

To which plaintiffs except.

Defendant moves to strike from the record the statement of plaintiffs' Counsel in responce to defendant's objections to the introduction of any testimony on the ground that such statement is incompetent, irrelevant and immaterial.

Referee sustains motion of defendant's Counsel to strike from the record statement by Counsel for complainant.

To which plaintiffs except.

The referee over-rules the objection of the defendant to the introduction of any evidence, solely on the ground it is not within his jurisdiction to pass upon matter of law involved in this case.

To which defendant excepts.

Whereupon plaintiffs offer Hugh M. Morris as witness for plaintiffs, who being duly sworn is offered as witness.

Defendant — same objection. Over-ruled. Exception.

Defendant further objects on the ground that the questioning is irrelevant, incompetent and immaterial, and for the further reason that the decision of the Secretary of the Interior in regard to the land in controversy is conclusive as to the facts which are the basis of this cause of action.

Objection over-ruled. Exception.

Direct examination.

By KENNETH S. MURCHISON:

Q. What is your name?
A. Hugh M. Morris.

Same objection. Over-ruled. Exception.

Q. How old are you, Mr. Morris?
A. Thirty-four years old.

Same objection. Over-ruled. Exception.

Q. Where do you live?
A. I live at Tahlequah, Oklahoma.

Same objection. Over-ruled. Exception.

Q. Do you know Robert B. and Fannie D. Ross?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Do you know what their nationality is? What their blood is?

Same objection. Over-ruled. Exception. Defendant further objects for reason that it is not the best evidence.
Objection over-ruled. Exception.

A. They are Cherokees by blood.
Q. Do you know Dr. C. M. Ross?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Do you know James W. Duncan?
A. Yes, sir.

Same objection. Over-ruled. Exception.

52 Q. Do you know James Day?
A. Why, yes, sir. I know him.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with the lands in controversy, in this case?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. What if anything did you ever have to do in connection with these lands?
A. I helped run out the lines, and establish the corners, setting posts along the line.

Same objection. Over-ruled. Exception.

Q. About when did this occur?
A. About the first of March, 1904, about that.

Same objection. Over-ruled. Exception.

Q. Who was with you?
A. Mr. Duncan, Dr. Ross and a young man that lived here near town. I don't know who he was. I don't remember his name.

Same objection. Over-ruled. Exception.

Q. Now when you assisted in running these lines and setting these posts, did you observe any improvements of any material character on those lands at that time?
A. There was a portion of it in cultivation, two sides of a fence on it, a fence corner on one of the ten acre tracts.

Same objection. Over-ruled. Exception.

Q. What ten was that?

A. It was the West ten in the North twenty.

Same objection. Over-ruled. Exception.

Q. About how many posts did you set, if you recall?
A. We set at each corner,—we set three; one in the corner and two each way, if I am not mistaken, and at intervals we set posts as we had them to mark out the lines.

Same objection. Over-ruled. Exception.

Q. Now what did you do with the underbrush, if anything on the line of these tracts?
A. We chopped out the line so as to make it and blazed the trees.

Same objection. Over-ruled. Exception.

Q. While you were engaged in making this survey and setting these posts, did you see any other person besides Dr. Ross and Mr. Duncan along there?
A. I saw several parties.

Same objection. Over-ruled. Exception.

Q. Did you see Jim Day?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you have any conversation with him?
A. We asked him about a corner. Some definite rock that we could set up on to begin to run the line.

Same objection. Over-ruled. Exception.

Q. Did you tell him anything about, or did he say anything about the lines of the particular tracts of land that you were surveying?
A. No, sir. We didn't have any talk with him as to that.

Same objection. Over-ruled. Exception.

Q. Was that one of the corners of this land?
A. The corner we asked him about was half mile rock for a starting point.

Same objection. Over-ruled. Exception.

Q. Did he ask you or Dr. Ross in your presence anything about what improvements they were putting there?
A. I do not recollect it, no, sir.

Same objection. Over-ruled. Exception.

Cross-examination.

By JAMES A. VEASEY:

53 Q. Mr. Morris are you related in any way to Mr. Ross or——

Objection by plaintiffs.

Q. Fannie D. Ross?

Objection over-ruled. Exception.

A. I am related to him by marriage. He is my brother-in-law.

Q. Mr. Morris, did you and Mr. Duncan and Dr. Ross place posts about other tracts of land than this thirty acres which is in dispute when you were in Bartleville in March, 1904?

A. No, sir.

Q. Did you survey any land looking toward allotment of it in addition to this thrity acres, about that time?

A. Mr. Duncan and I? No, we surveyed no land.

Q. What time of the day was it that you and Dr. Ross and Mr. Duncan reached the land which is in controversy here?

A. Why, it was in the forenoon of the second day. We walked out there the first day and run one line. On the second day—it was in the forenoon.

Q. By "fencing" didn't you mean the posts you put around it?

A. Yes, sir.

Q. When you got there the morning of March, first what improvements if any, were there on the North twenty acres of the land that is in this suit?

A. The North twenty acres, there was Mr. Johnston or Mr. Keeler, one or the other, I can't recall which, owned a farm of some acre and a half of the West ten in that field. That is all the improvements on the North twenty.

Q. What improvement if any, were there on the South ten of the land in controversy?

A. There was no improvements.

Q. Now which tract did you begin placing posts about first?

A. On the South ten.

Q. And when did you begin placing posts about the South ten?

A. Why, in the afternoon.

Q. Of March first?

A. Yes, sir.

Q. Ho wlong were you and Dr. Ross and Mr. Duncan engaged in putting posts around this South tract of land?

A. The South tract? It was only a short time after we established the corners before we begun work, if I remember correctly.

Q. What was the size of the posts you used, Mr. Morris?

A. They were average sized posts.

Q. There were no split posts?

A. No, sir. Whole posts.

Q. Mr. Duncan has testified that these posts were saplings about four feet long and about half as big as a man's arm.

A. Why, they were longer than that, they might have been some longer, except for that they were sapling posts.

Q. Now you say one post was put in each corner of the ten acre tract, and tw- posts put in the corner looking at right angles from that middle post?

A. One in the corner looking west and two others looking west, and looking in the other direction we set two. There was five posts in the corner.

Q. The posts that you set between those groups of posts were set at intervals apart, were they?

A. They were at various intervals.

Q. What would you judge to be the distance apart?

A. They were not a uniform distance apart.

Q. Approximately, were they as far apart as fifty or sixty feet?

A. I can't say whether they were or not. I can't say.

Q. It is true, isn't it that both of these tracts were heavily timbered?

A. They had been heavily timbered, but there had been quite a considerable amount of timber taken out.

Q. How long did it take you and those engaged with you to do such work as you did on the South ten?

54 A. The South ten?

Q. How long in hours?

A. It didn't take very long on the bank of the river.

Q. Did it take more than an hour?

A. I couldn't say as to the time. It wasn't a very heavy task.

Q. Immediately after you put those posts on the South ten, as you described, did you go *the* the North twenty?

A. We continued the work. I don't remember whether we run *the* out the line of the North twenty acres or not. I do not recall whether we had the North twenty run out at that time or not.

Q. Do you know when you began putting posts around the North twenty?

A. It was immeadiately after we finished the South ten, we run it out and completed it and went up the river bank to the North twenty.

Q. The same day?

A. The same day, yes.

Q. How long were you engaged in doing work on both of these tracts of land?

A. A good part of two days.

Q. How long did it take you to actually put the posts there?

A. I can't recall the time.

Q. How long did it take you *the* actually set the posts? In your testimony before the Dawes Commission in this case the question was asked you as follows: "About how many hours were you engaged in doing this work?" Answered "I should judge four or five hours, five or six hours, about five hours, I should judge." Is that the answer you would give in this case?

A. Yes, that is the answer I would give.

Q. Mr. Morris, in what stage during the work while you were putting posts about either of these tracts of land, was it that you saw Jimmy Day?

A. We saw him twice that day. We saw him twice.

Q. Did you see him once with a wagon?

A. We saw him twic*w* with a wagon.

Q. Was there any wire in that wagon?

A. Yes, sir.

Q. Was his wife with him?
A. Yes, she was once.

Redirect examination.

By KENNETH S. MURCHISON:

Q. Mr. Morris, you have testified in you- cross examination that in regard to the under-brush, you cut out the line. Could you stand at any one corner of any one of these tens and observe the posts down the line as they were set by you and the trees that were blazed?
A. I disremember, but I think we could. I think that it was very open woods. The woods were very broken.

Same objection. Over-ruled. Exception.

Q. You are a Cherokee, are you?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Where did you go to school, Mr. Morris?

Same objection. Over-ruled. Exception. Defendant further objects for the reason — the question is irrevalent, immaterial and incompetent. Over-ruled. Exception.

A. I went to school in the Cherokee Nation.

Same objection. Over-ruled. Exception.

Q. Did you graduate there in the National School?
A. No, sir.

Same objection. Over-ruled. Exception.

Q. Now would you from your own knowledge of the improvements placed there by yourself, Dr. Ross and Mr. Duncan on or about the first day of March, 1904 upon the land in question, have observed those improvements there if you were looking for lands to be allot-ed to you?

Same objection. Over-ruled. Exception. Defendant further objects to the question for the reason that the peoper foundation
55 therefore has not been made, and for the further reason that the same calls for an opinion rather than a statement of facts.
(Counsel for complainant states that the witness has testified that he is a Cherokee Citizen, has shown that he is a man of intelligence and capable of giving answers to questions. This question is in a hypothetical ferm.)
Objection sustained. Exception.
Council for plaintiffs: That is all.
Counsel for defendant: That is all.
Witness dismissed.

Plaintiffs offer Mrs. Hill as witness.
Defendant Day objects to the introduction of any evidence for the following reasons:
1. Because plaintiffs' complaint does not show a cause of action.

2. Because there is a misjoindar of causes of action and a misjoinder of parties herein.

3. Because the *the* land is dispute has been determined by the Secretary of the Interior on the 31st day of May, 1907, and by the decision of said Secretary on the 16th day of August, 1907 denying a motion of review of said decision of May, 31st, the effect of which several decisions is to make the facts found in said decision conclusive upon the parties thereto.

4. Because no evidence *cna* be taken in this case unless there are allegations of fraud in the taking of the testimony before the department of the Interior, or unless there are allegations of mistake in the taking of said testimony specifically pointing out the mistake relied upon by the plaintiffs, neither of which allegations of fraud or mistake have been set out in plaintiffs' complaint.

Counsel for plaintiffs states that as to the exceptions of Counsel for the defendant Numbers 1 and 2, said questions are res judicata, having been decided by the District Court formerly having jurisdiction of this cause, at Muskogee on the 5th day of August, 1908.

As to the third exception of Counsel for defendant, it is immaterial, irrevalent and does not effect this issue, and co-tains conclusions of law denied by the plaintiffs and of which the referee has no jurisdiction, and because Plaintiffs' Bill of Complaint sufficiently alleges facts to constitute a cause of action as finally decided by the presiding judge of the Third Judicial District of Oklahoma.

Thereupon Counsel for plaintiffs moves to strike from the records the exceptions of the Counsel for the defendant.

Referee over-rules motion of plaintiffs' Counsel to strike from the record the exceptions of the defendant's Counsel.

To which plaintiffs except.

Defendant moves to strike from the record the statements of plaintiffs' Counsel in responce to Defendant's objection to the introduction of any evidence on the ground that such statement is incompetent, irrevalent and immaterial.

Referee sustains motion of defendant's Counsel to strike from the record statement by Counsel for complainant.

To which plaintiffs except.

The referee over-rules objection of defendant to the introduction of any evidence, solely on the ground that it is not within his jurisdiction to pass upon matters of law involved in this case.

To whizh defendant excepts.

Whereupon plaintiffs offer Mrs. HILL as witness for plaintiffs who being duly sworn is offered as witness.

Defendant's same objection. Over-ruled. Exception. Defendant further objects on the ground that the questioning is irrevalent, incompetent and immaterial and for the further reason that the decision of the Secretary of the Interior in regard to this land in controversy is conclusive as to the facts whcih are the basis of this cause of action.

Objection over-ruled. Exception.

56 Direct examination.

By KENNETH S. MURCHISON:

—. State your name to the stenographer there.
A. Lucinda Hill.
Q. How old are you?
A. I am thirty-nine years old.

Same objection. Over-ruled. Exception.

Q. Where do you live Mrs. Hill?
A. I live at Coal Bridge, on the Caney River.

Same objection. Over-ruled. Exception.

Q. Are you the wife of the keeper of that bridge?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with the land in controversy between Robert B. Ross and James Day in this contest?
A. I suppose I am, I live right adjoining the land.

Same objection. Over-ruled. Exception.

Q. Do you remember anything about any improvements being placed there by Mr. Ross, or do you know Mr. Ross?
A. I saw him one time.

Same objection. Over-ruled. Exception.

Q. And do you remember anything about any improvements on any of those ten acres of that tract?
A. Those put here by him four years ago are all the improvements. They come down on the first day of March and surveyed the land and drove the posts. I got dinner for them on that day.

Same objection. Over-ruled. Exception.

Q. You got dinner for them on that day?
A. Yes, sir, on that day.

Same objection. Over-ruled. Exception.

Q. How long have you live- there in that place, Mrs. Hill?
A. We have lived there going on six years, five years the second Sunday in August this last.

Same objection. Over-ruled. Exception.

Q. At the time those posts were driven and left, were there any improvements on those lands?
A. There wasn't any whatever. None at all.

Same objection. Over-ruled. Exception.

Q. Well about how long before that was that land in the possession of Messrs. Keeler & Johnstone?

Same objection. Over-ruled. Exception. Defendant further objects for the reason that the questioning supposes an answer which has not been made by the witness.

Objection sustained.

Q. Do you know whether anybody else at any time had any improvements on that land?
A. None that I know of.

Same objection. Over-ruled. Exception.

Q. Did Jim Day have any improvements on there before these posts were put there?
A. No, he didn't have any at all.

Same objection. Over-ruled. Exception.

Q. Do you know what improvements if any, were put there by Dr. Ross and those gentlemen who were with him?
A. Nothing but some posts that I know of.

Same objection. Over-ruled. Exception.

Q. Did you ever see those posts?
A. Yes, I saw them. They cut some and Mr. Beard fetched some for him.

Same objection. Over-ruled. Exception.

Q. Did they indicate any line where they could see along?
A. Not that I know of. They drove their corner posts.

Same objection. Over-ruled. Exception.

Q. You only saw the corner post?
A. Yes that is all I saw.

Same objection. Over-ruled. Exception.

—. Do you know anything about the under-brush on this
57 land, whether there was any or not?
A. No, I don't know anything about that.

Same objection. Over-ruled. Exception.

Q. Well, were cattle in there,—do you know whether any cattle was grazing on any of that land at that time?

Same objection. Over-ruled. Exception. Defendant further objects for the reason that the question is immaterial, irrevalent and incompetent.
Objection over-ruled. Exception.

Q. Answer that Mrs. Hill.
A. At any time they wanted to.

Same objection. Over-ruled. Exception.

Q. Now, what has been you- observation, Mrs. Hill, as to the effect on the underbrush in the bottom land where cattle ranges,——

Objected to by the defendant for the reason that it is incompenent, immaterial and irrevalent. Over-ruled. Exception.

Q. You understand what I meant?
A. Not just exactly, I don't.

Q. Now, where cattle range in woodland, do they destroy the underbrush, or does the underbrush grow with the same profusion. In short does underbrush grow as it would if they did not range there?

Same objection. Over-ruled. Exception.

A. I do not think it does.

Q. Now on the day that Mr. Ross, Dr. C. M. Ross, for whom you got dinner that day, did you see Mr. Jim Day on that day that they were down there surveying?

A. Yes, sir, he went across the bridge with a load of wire.

Same objection. Over-ruled. Exception.

Q. From what dir-ction did he come?

A. He was coming from town toward home.

Same objection. Over-ruled. Exception.

Q. Did you see him when he went to town?

A. No, I can't remember.

Same objection. Over-ruled. Exception.

Q. About what time in the day was it when you saw him going away from town?

A. It was along about noon.

Same objection. Over-ruled. Exception.

Q. About noon?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you see any conversation with Dr. Ross, Mr. Morris, or any of those gentlemen whom were with Dr. Ross?

A. No, I didn't.

Same objection. Over-ruled. Exception.

Q. What did he have in his wagon, if you noticed?

A. He had some galvinized wire and some little black wire in his wagon.

Same objection. Over-ruled. Exception.

Cross-examination.

By JAMES A. VEASEY:

Q. How long have you lived in the toll house?

A. We have lived there going on six years. Six years in August.

Q. You and your husband keep the toll gate, do you not, at the present?

A. Yes, sir.

Q. How long had you lived in the neighborhood of this land before you took charge of the toll-bridge?

A. We lived in the country going on eleven years, to the best of

my recollection. We have lived on the east side and the south side and now we love on the west side.

Q. You mean this river near this land, which it joins?

A. Yes, sir.

Q. Did you ever see Jimmy Day or Clarence Day cutting timber on this land, Mrs. Hill?

A. Yes, they lived there on the place. Jim Day and Clarence Day cut timber for wood.

Q. And for fence posts? You never saw them make any fence posts at all? You say that you served dinner for Dr. Ross
58 and these other two men?

A. There were three other men.

Q. Mrs. Hill, were you attending the toll gate yourself?

A. Yes, sir, I was tending the toll gate, myself.

Q. That kept you pretty close around the house didn't it?

A. Yes, sir. I was there most of the time that day, and most every other day.

Q. How far from where the house is, is that ten acre tract around which they have set up some posts?

Objection by plaintiffs. Objection over-ruled. Exception.

A. Well, I couldn't say. I am no judge of land, we could see the land from our house.

Q. About how far?

A. Well, I am a poor guess. I would hate to try and guess.

Q. As much as two or three hundred yards?

A. Probably as much as two hundred yards, will say.

Q. Was there any timber to speak of between the toll-house and that ten acre tract?

A. Was not to amount to anything.

Q. Did the road lead toward the ten acre tract or in another direction?

A. Well, there was a road which lead toward the ten acre tract.

Q. Now, did you have the occasion to be on either of these two tracts of land that they are disputing about on the first day of March, 1904?

A. Yes, sir.

Q. How did you happen to be on the land?

A. Well, I went there. We had a garden on the Boudinot,—— Charlie Kingfisher owned it at that time, and I went from the gate to the garden.

Q. In doing so, did you cross to the west or to the east side of the river in going to your garden?

A. Well, I should say the south side of the river. The piece set north and south and we are on the north end.

Q. And your garden was across the river south?

A. The land runs south to our garden.

Q. You saw these men putting those posts right on the line?

A. Right on the other side of the place. They were unloading posts.

Q. You mean on the east side of the place, where your garden was?

A. No, I mean the south side.

Q. South side?

A. Yes, sir.

Q. They were putting those posts on the south side?

A. Yes, sir, on the south side.

Q. That was south of where you- house is?

A. Right at the bridge.

Q. Mrs. Hill, how does it happen that you remember so distinctly that this was the first day of March?

A. There were several around there fencing and land surveying, there was another outfit surveying and wanted me to get dinner for them the same day, and I told these fellows that I would get dinner for them. They went up to Mrs. Lewis's. That is the reason I know.

Q. Would you swear upon your oath that that was the first day of March rather than the second day?

A. It was the first day of March.

Q. You do not know anything about the north twenty acres of land, north of the Bixler house, do you? I mean the putting of posts around it by these gentlemen?

A. I don't know anything about it.

Q. About all you saw was when they put the corner posts?

A. That was all I saw. They cut some posts and took them acro s the river, I don't know where to.

COUNSEL FOR PLAINTIFFS: That will do.

COUNSEL FOR DEFENDANT: That will do.

Witness excused.

Plaintiffs offer Mr. HILL as witness.

59 Defendant James Day objects to the introduction of any evidence in this cause for the following reasons:

1. Because plaintiffs' complaint does not state a cause of action.

2. Because there is misjoinder of causes of action and a misjoinder of parties plaintiff herein.

3. Because the land in dispute has been determined by the Secretary of the Interior to be the allotment of the defendant by decision rendered by the Secretary of the Interior on the 31st day of May, 1907, and by the decision of the said Secretary on the 16th day of August, 1907, denying a motion for a review of said decision of May, 31st, the effect of which said several decisions is to make the facts found in said decisions conclusive upon the parties thereto.

4. Because no evidence can be taken in this case unless there are allegations of fraud in the taking of the testimony before the Department of the Interior, or unless there are allegations of mistake in the taking of said testimony specifically pointing out the mistake relied upon by the plaintiffs, neither of which alleagations of fraud or mistake have been set out in plaintiffs' complaint.

Counsel for plaintiffs states that as to the exception of Counsel for

defendant Numbers 1 and 2, said questions are res judicata, having been decided by the District Court formerly having jurisdiction of this cause at Muskogee on the 5th day of August, 1908.

As to the third exception of Counsel for defendant, it is immaterial, irrelevant and does not affect this issue, and contains conclusions of law denied by the plaintiffs and od which the referee has no jurisdiction, and because plaintiffs' Bill of Complaint sufficiently alleges facts to constitute a cause of action as finally determined by the presiding judge of the Third Judicial District of Oklahoma.

Therefore Counsel for plaintiffs moves to strike from the record the exceptions of counsel for the defendant.

Referee over-rules motion of plaintiffs' counsel to strike from the record the exceptions of defendant's Counsel.

To which plaintiffs except.

Defendant moves to strike from the record the statement of plaintiffs' Counsel in response to defendant's objections to the introduction of any testimony on the ground that such statement is incompetent, irrelevant and immaterial.

The referee sustains the motion of defendant's Counsel to strike from the record statement by Counsel for complainant.

To which plaintiffs except.

The referee over-rules the objection of the defendant to the introduction of any evidence, solely that it is not within his jurisdiction to pass upon matters of law involved in this case.

To which defendant excepts.

Whereupon, plaintiffs offer Mr. HILL as witness for plaintiffs, who being sworn is offered as witness.

Defendant's same objection. Over-ruled. Exception.

Defendant further objects upon the ground that the questioning is irrevalent, incompetent and immaterial and for the further reason that the decision of the Secretary of the Interior in regard to the land in controversy is conclusive as to the facts which are the basis of this cause of action.

Objection over-ruled. Exception.

Direct examination.

By KENNETH S. MURCHISON:

Q. State your name, age and residence, Mr. Hill.

A. J. R. Hill is my name, pretty near fifty years old; I reside near the Toll Bridge on the Caney, South of town.

60 Same objection. Over-ruled. Exception.

Q. About how far is that from Bartlesville?

A. Well, it is about two mile-, I guess, the way the river runs.

Same objections. Over-ruled. Exception.

Q. Do you know Colonel Robert B. Ross?

A. Yes, I saw him.

Same objection. Over-ruled. Exception.

Q. Do you know James Day?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with the land which is in controversy in this suit?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Were you acquainted with the lands about a little over four years ago, about March 1st, 1904?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. If you remember anything about what occur-ed on that day or about that time, please state it to the referee with reference to the improvements being put on any of those lands?
A. Well, on the first day of March, 1904, Mr. Ross, I think they called him Doctor, came to our place and then went upon there and surveyed this land.

Same objection. Over-ruled. Exception.

Q. Surveyed these lands?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Now, what was the conditions of these lands with regard to improvements when they came there?
A. There wasn't any at all on them, with the exception of a little corner of the twenty in the Bixler farm, up in the Johnstone field.

Same objection. Over-ruled. Exception.

Q. Who is Mr. Bixler?
A. He is the tenant who lives there for Mr. Johnstone. He is a brother-in-law of Mr. Johnstone.

Same objection. Over-ruled. Exception.

Q. What do you know was done by Mr. Ross and the gentlemen who were with him on the day you referred to in regard to putting improvements on these lands?
A. They surveyed the land and set some corner posts there.

Same objection. Over-ruled. Exception.

Q. Well, were those posts so set so that they were easily observed by passesers by *by* the land?

Defendant Day objects to the question for the reason that it calls for an opinion rather than a statement of facts.
Objection sustained. Exception.

Q. Were those posts so set that they could be observed by any one passing on that land?
A. Yes, sir. They were ordinary fence posts, round posts I think.

Same objection. Over-ruled. Exception.

Q. A round post?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Were they marked in any was, did you notice?
A. No, I didn't notice any marks.

Same objection. Over-ruled. Exception.

Q. Were any of them blazed?
A. One of them was, I couldn't say about the rest.

Same objection. Over-ruled. Exception.

Q. Now, what posts dd you observe more partcularly, on what corner of the land?
A. In the line in the half mile in the center of the Section. I was standing there when they put that post up.

Same objection. Over-ruled. Exception.

Q. What side of the river was that podt located?
A. On the south side of the river on the bank.

61 Same objection. Over-ruled. Exception.

Q. Should I call the west side the side your house is?
A. Yes, sir. The same side.

Same objection. Over-ruled. Exception.

Q. Well, did you notice or have the occasion to observe whether there were any other posts set on that land?
A. No, I did not see any.

Same objection. Over-ruled. Exception.

Q. Well, did you see Jim Day on that day, on the first day, on the day Colonel Ross put these posts up?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you have any conversation with him?
A. No, I didn't have any conversation with him.

Same objection. Over-ruled. Exception.

Q. Did you see him in conversation with Dr. Ross or any of the gentlemen who were with him?
A. Yes, I was standing there.

Same objection. Over-ruled. Exception.

Q. Where was that conversation held?
A. It was just across the opposite side of the river, on what you would call the east side of the river.

Same objection. Over-ruled. Exception.

Q. Were you near enough to hear any of that conversation, Mr. Hill?

A. No, I did not hear any of the conversation, I do not believe.

Cross-examination.

By JAMES A. VEASEY:

Q. Mr. Hill, how long have you lived in the neighborhood of this land?

A. It has been about nine years.

Q. Have you ever observed James Day, or Clarence Day, his son, cutting timber on this land?

A. Yes, he used to frequently cut there, and to let different fellows through there.

Q. Do you understand that the land which is in dispute is in two tracts, and that the south tract of the two is a ten acre tract?

A. Yes, sir.

Q. How far is you- Toll House from the south ten acre tract?

A. Oh, I suppose one hundred yards, about a hundred yards, something in that neighborhood.

Q. Now this South ten acre tract that you saw them put the posts on on the first day of March, how did you happen to be there, Mr. Hill?

A. I was farming just across the river there.

Q. Mr. Hill, you do not know anything about the north twenty that day do you?

A. No, sir. I don't.

Q. It was just the south ten that you know about?

A. Yes, sir. That is all I saw.

Q. You just saw them put in the corner posts there and one at each of the four corneres—you didn't see them put any posts between?

A. No.

Q. What makes you think that this was the first day of March, rather than the second day of March, Mr. Hill?

A. Everybody kept me up all night crossing over the bridge. There was a big rush going on to Delaware, and most of the talk heard was getting allotments.

Q. What time of the day was it when they were putting that post on the South ten?

A. It was in the afternoon, I suppose along about two o'clock.

62 Redirect examination.

By KENNETH S. MURCHISON:

Q. Mr. Hill, did you ever see Jim Day, or any of his family cutting wood on this particular ten acres?

A. Not until after those parties took the land.

Same objection. Over-ruled. Exception.

Q. Did you ever see Jim Day or any of his people cutting timber on the north twenty?

A. No, I never saw them cut any timber there.

Same objection. Over-ruled. Exception.

Q. Well, now did you ever cut any timber on that, or any of that land in that bottom there?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did other people besides Mr. Day?
A. Yes, a good many people from town did.

Same objection. Over-ruled. Exception.

Counsel for plaintiffs. That is all.
Counsel for defendant: That is all.

Meeting adjourned until 7:30 o'clock P. M.

Meeting convened at 7:30 o'clock P. M. Plaintiff present by Kenneth S. Murchison, his attorney. Defendant present by his attorney, James A. Veasey.

Plaintiffs offer Charles M. Ross as witness.

Defendant Day objects to the introduction of any evidence in this case for the following reasons:

1. Because plaintiffs' complaint does not state a cause of action.

2. Because there is a misjoinder of causes of action and a misjoinder of parties plaintiff herein.

3. Because the land in dispute has been determined by the Secretary of the Interior to be the allotment of the defendant by decision rendered by the Secretary of the Interior on the 31st day of May, 1907 and by the decision of said Secretary on the 16th day of August, 1907 denying a motion for a review of said decision of May 31st, the effect of which said several decisions is to make the facts found in said decision conclusive upon the parties thereto.

4. Because no evidence can be taken in this cause unless there are allegations of fraud in the taking of testimony before the Department of the Interior, or unless ther- are allegations of mistake in the taking of said testimony specifically pointing out the mistake relied upon by the plaintiffs, neither of which allegations of fraud or mistake have been set up in plaintiffs' complaint.

Counsel for plaintiffs states that as to the exceptions of the Counsel for defendant Numbers 1 and 2, said questions are res judicata, having been decided by the District Court forme-ly having jurisdiction of this cause at Muskogee on the 5th day of August, 1908.

As to the third exceptions of Counsel for defendant, it is immaterial, irrevalent and does not affect this issue, and contains conclusions of law denied by the plaintiffs and of which the referee has no jurisdiction, and because plaintiffs' Bill of Complaint sufficiently alleges facts to constitute a cause of action as finally determined by the presiding judge of the Third Judicial District of Oklahoma.

Therefore, counsel for plaintiffs moves to strike from the record the exceptions of counsel for defendant.

Referee over-ruled motion of plaintiffs' Counsel to strike from the record the exceptions of defendant's Counsel.

To which plaintiffs except.

Defendant moves to strike from the record the statement of plaintiffs' Counsel in responce to defendant's objection to the introduction of any evidence on the ground that such statement is incompetent, ir-elevant and immaterial.

Referee sustains the moyion of the defendant's Counsel to strike from the record the s-atement by Counsel for Complainant.

63 To which plaintiffs except.

The referee over-rules the objection of the defendant to the introduction of any evidence, solely on the ground that it is not within his jurisdiction to pass upon matters of law involved in this case.

To which defendant excepts.

Whereupon, plaintiffs offer Charles M. Ross as witness for plaintiffs, who being duly sworn is offered as witness.

Defendant's same objection. Over-ruled. Exception.

Defendant further objects on the ground that the questioning is irrelevant, incompetent and immaterial and for the further reason that the decision of the Secretary of the Interior in regard to the land in controversy is conclusive as to the facts which are the basis of this cause of action.

Objectio- over-ruled. Exception.

Direct examination.

By KENNETH S. MURCHISON:

Q. State your name, age and residence.

A. Charles M. Ross; age thirty-nine; post office Tahlequah.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with Robert B. Ross and Fannie D. Ross?

A. My father and mother.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with James Day?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Do you know anything about the land in controversy in this proceeding?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. What, if any connection, do you have with the matter of the making of specified improvements on the tracts in controversy?

A. I personally made improvements upon this thirty acres in controversy on the first day of March, 1904.

Same objection. Over-ruled. Exception.

Q. Who was with you at the time you made this improvement?
A. We had a surveyor, Mr. John Duncan, and my brother-in-law, Hugh M. Morris, and a driver with a wagon and team, his name was Beard, a young fellow about sixteen or eighteen years old.

Same objection. Over-ruled. Exception.

Q. What did you do on the first of March in regard to making improvements on this land,—on these several tracts?
A. On the night of the 29th of Februarym I went down to Daniel's or McDaniel's stable, immediately behind the Right-of-way Hotel here, and hired the wagon and team and the boy, gave him special instructions where to go to and arrived there and began cutting posts as soon as he got on the land. The land was easily described from the fact that it was near the suspension bridge south of town and near Mr. Bixler's land. On the morning on the first of March he went down there and began cutting the posts as directed. About ten o'clock I think, Mr. Duncan, Mr. Morris and myself went down there and after looking around over the whole country down there finally made a point to start from and surveyed and finally located these two tracts of land. And as soon as we located them definitely, we took the wagon and team and this wagon load of posts we had there and proceeded to put the posts around the
64 south ten first and later around the North twenty. We put posts around bith tracts.

Same objection. Over-ruled. Exception.

Q. Who is Mr. Bixler refereed to by you in your statement?
A. Bixler was a tenant on the Fred Keeler farm, south of town. That is the land which is immediately adjacent to the North twenty. In fact, there was a part of this North twenty,—the west ten of this north twenty was in cultivation.

Same objection. Over-ruled. Exception.

Q. He is a relative of Mr. William Johnstone's?
A. He is a son-in-law or brother-in-law.

Same objection. Over-ruled. Exception.

Q. Did Mr. Keeler or Mr. Bixler make any objections to your making separate improvements upon these two tracts of lands?
A. No, I got the description of the land from Mr. Keeler, and got considerable information from Mr. Bixler with reference to this land.

Same objection. Over-ruled. Exception.

Q. Did anyone who was in possession of the land in cultivation in the West ten offer to pay you any rent for your farm?
A. No, they never offered to pay me anything for it. I made a contract with him.

Same objection. Over-ruled. Exception.

Q. You made a contract with him for your father? What was the nature of that contract? Was it in writing?
A. No, sir,—verbal.

Same objection. Over-ruled. Exception.

Q. What was the contents of that contract with him?

A. I gave him permission, as my father's agent, to farm that small tract of land in the enclosure he had it, in grain at that time, provided he would maintain the fences and keep it in cultivation.

Same objection. Over-ruled. Exception.

Q. What, if any improvements were on these tracts of land at the time you commenced to make the improvements that you have described on the first day of March?

A. Well, for the exception of about two acres, or nearly two acres, in this field of Keeler's, there was no improvement of any kind, except the old fence rows were there if you consider them improvements, bu- the wire had been cut from the trees. There were no improvements whatever, except this small tra*t*c of land, this west ten.

Same objection. Over-ruled. Exception.

Q. I will ask you to describe particularly what kind of improvements you placed on those tracts of land?

A. We put posts about 4 to 6 inches in diameter, on each corner surrounding each separate tract, and about 8 to 10 feet from the corner we placed another post each way, and 10 feet another post each way, making five posts on each corner, and alon- each line from each corner, at intervals of perhaps fifty or seventy-five feet we placed additional posts and cleared up the line so that any body passing along could see that there was a line of posts on this particular line.

Same objection. Over-ruled. Exception.

Moved to strike out that part of the witness' testimony that any one passing along could see the posts, as not responsive to the question.

Objection. Sustained. Exception.

Q. What did you do Doctor, besides placing these posts on the line?

A. That was all we did except clear up the line.

Same objection. Over-ruled. Exception.

Q. That is, you cut the underbrush?

A. We cut the underbrush. There was very little underbrush there.

Same objection. Over-ruled. Exception.

Q. Well, after you had set up these posts and cleared up the line, will you state Doctor, whether it was possible for any one
65 to st*n*ad at any of those corners and observe the line on the two directions on the tract?

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that the question calls for an opinion of the witness instead of a statement of facts.

Objection sustained. Exception.

A. It would have been impossible for anybody to have stood on any of those corners and not have seen the posts that I put there.

Q. Could it have been possible for anyone to put a fence around any of these tracts after you had put those posts there and cleared up the line, without observing those posts?

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that the question calls for an opinion of the witness instead of a statement of fact.

Objection sustained. Exception.

A. It is physically impossible.

Q. Now, doctor, you are a Cherokee?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. With the posts that you had put around these tracts of land, just as you left them on the first day of March, 1907——

A. Four——

Q. 1904, would you have been placed on notice if you were seeking land to allot of the fact that some one had undertaken improvements there?

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that it calls for an opinion of the witness instead of a statement of fact, and for the further reason that it calls for a conclusion of law. Objection sustained. Exception.

A. I certainly would have.

Q. Now, did you see the defendant Day on the day you were placing those posts around there?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did you have any communication with the defendant Day about the making of the improvements upon this land?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Will you state what that conversation was, especially with reference to the improvements you were making on the land?

A. As I remember, after we had made these improvements on the South ten, it was necessary for us to run the east line north a quarter of a mile in order to find the southeast corner of the North twenty, after crossing the road we met Mr. Day and his wife in a wagon. They stopped us. We had quite a conversation with them in reference to various things and in particular in reference to this work that I was doing, and Mr. Day had his wagon loaded with wire, told me he was going across the river to his home place and warned me particular not to do any fencing on the west side of the river.

Same objection. Over-ruled. Exception.

Q. On the west side?

A. On the east side of the river.

Same objection. Over-ruled. Exception.

Q. Did you tel himl what particular tract you were engaged in fencing?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Did he raise any objections to your working there in making these improvements?

A. None whatever.

Same objection. Over-ruled. Exception.

Cross examination by JAMES A. VEASEY:

66 Q. Doctor, at what intervals apart did you say that these posts were other than the corner posts and the two or three that were grouped in the corners?

A. We didn't establish a distance. Where it was open alon- the road we put them prehaps fifty to seventy-five feet apart. Where there was thicket or underbrush, we put them closer together. I would say at a bad guess, about thirty feet apart.

Q. Then if Mr. Duncan testified that he put them forty and seventy-five yards apart, he is mistaken, is he?

A. I wouldn't care to specify facts in reference to it without measuring it, but it don't seem to me that that was the way it was.

Q. Were those posts split posts?

A. Some of them were and some whole posts.

Q. How many posts that were used were split posts? What proportion of them?

A. I can't be positive about it. I will say about a third or fourth.

Q. How many did you use in all?

A. About fifty or one hundred posts.

Q. Doctor, this placing of th-se posts was the only improvement made upon that land by yourself acting as agent of your father and mother, was it not?

A. Yes, sir.

Q. It is the basis of your claim in this action?

A. No, it is not the basis of the claim. Do you want me to go further into that at present?

Q. Has your father and mother, or any one for them occupied any portion of this thirty acres from the first day of March, 1904 until the present time?

A. No, if I am to understand actual physical possession.

Q. Through their own possession or through tenant?

A. I gave Mr. Bixler authority to continue to cultivate this land.

Q. That was with regard to that acre in his field.

A. Yes, sir.

Q. You never received any rent from him?

A. No.

Q. There was no written contract with him?

A. No, sir.

Q. You have had no dealings or transactions with him since that time with reference to it?

A. No, sir.

Counsel for Defendant: That is all.
Counsel for Plaintiffs: That is all.
Plaintiffs move to strike out cross examination as incompetent, irrevalent and immaterial.

Objection over-ruled. Exception.
Meeting adjourned until 10:00 o'clock, A. M.

Meeting convened at 10:00 o'clock A. M. Plaintiffs present by Kenneth S. Murchison, his attorney. Defendant present by his attorney, James A. Veasey.

Plaintiffs offer laws of Cherokee Nation, Article 1, Section 2, of the Constitution as in law of Cherokee Nation, 1892.

Defendant Day objects on the ground that such evidence is irrevalent, incompetent and immaterial.
Objection over-ruled. Exception.

To read from book:
"SEC. —. The lands of the Cherokee Nation shall remain common property, but the improvements made thereon, and in the possession of the Citizens of the Nation, are the exclusive and indefeasible right of the citizens respectively who made, or may rightfully be in possession of them: * * * Provided that the citizens of the Nation possessing exclusive and indefeasible right to their improvements as expressed in this article, shall possess no right or power to dispose of their improvements, in any manner what ever, to the United States, indiv-ual states, or to invididual citizens thereof."

Also in the same book, page 351, Article 23, of the Chapter 12 of the laws of the Cherokee Nation entitled "Prohibiting the sale and Restricting the leasing of real estate."

67 "SEC. 706. It shall not be lawful for any citizen of the Cherokee Nation to sell any farm, or other improvements in said Nation, to any person other than a bona fide citizen thereof * * * ."

Defendant urges the same objection. Over-ruled. Exception.

Further reading from the same book Chapter, 13, Article 5, Section 762, page, 377, "No claims to any place in the Cherokee Nation shall be valid under any act regulating the settlement of Public Domain, unless the person locating the same shall, within six months hereafter make improvements thereon to the value of $50.00, and be in actual possession thereof, or by agent lawfully resident in the Cherokee Nation, whether such place is to be used as a farm, residence, stock ranch, or place of business."

Defendant urges same objection. Over-ruled. Exception.

Plaintiffs offer William Johnstone as witness.

Defendant Day objects to the introduction of any evidence in this cause for the following reasons:

1. Because plaintiffs' Complaint does not state a cause of action.

2. Because there is a misjoinder of causes of action and a misjoinder of parties plaintiff herein.

3. Because the land in dispute has been determined by the Secretary of the Interior to be the allotment of the defendant by decision rendered by the Secretary of the Interior on the 31st day of May, 1907 and by the decision of the said Secertary on the 16th day of August, 1907 denying a motion for a review of said decision of May 31st, the effect of which said several decisions is to make the facts found in said decisions conclusive upon the parties thereto.

Because no evidence can be taken in this case unless there are allegations of fraud in the taking of the testimony before the Department of the Interior, or unless there are allegations of mistake in the taking of the said testimony specifically pointing out the mistake relied upon by the plaintiffs, neither of which allegations of fraud or mistake have been set out in plaintiffs' Complaint.

Counsel for plaintiffs states that as to exceptions of Counsel for defendant Numbers 1 and 2, said questions are res Judicata, having been decided by the District Court formerly having jurisdiction of this cause at Muskogee on the 5th day of August, 1908.

As to the third exception of Counsel for defendant, it is immaterian, *irrevalen* and does not effect this issue, and contains conclusions of law denied by the plaintiffs and of which the referee has no jurisdiction, and because plaintiffs' Bill of Complaint sifficiently alleges facts to constitute a cause of *a* action as finally determined by the presiding judge of the Thirs Judicial District of Oklahoma.

Therefore Counsel for Plaontiffs moves to strike from the record the exceptions of defendant's counsel.

Referee over-rules motion of Plaintiffs' Counsel to strike from the records the exceptions of defendant's Counsel.

To which plaintiffs except.

Defendant moves to strike from the record *to* statements of plaintiffs' counsel in responce to defendant's objections to the introduction of any evidence on the ground that such statement is incompetent, irrev*alen*t and immaterial.

The referee sustains the motion of defendant's Counsel to strike from the records statement by counsel for complainant.

To which plaintiffs except.

The referee over-ruled the objections of the defendant's Counsel to the introduction of any evidence, solely on the ground that it is not within his jurisdiction to pass upon matters of law involved in this case.

68 To which defendant excepts.

Whereupon, plaintiffs offer WILLIAM JOHNSTON as witness for plaintiffs, who being duly sworn is offered as witness.

Defendants' same objection. Over-ruled. Exception.

Defendant further objects on the ground that the questioning is irrelevant, incompetent and immaterial and for the further reason that the decision of the Secretary of the Interior in regard to the land in controversy *in* conclusive as to the facts whcih are the basis of this cause of action.

Objection. Over-ruled. Exception.

Direct examination.

By KENNETH S. MURCHISON:

Q. Please state your name, age and residence.
A. William Johnstone. Forty-eight years of age, residence, Bartlesville, Oklahoma.

Same objection. Over-ruled. Exception.

Q. Are you a citizen of the Cherokee Nation, Mr. Johnstone?
A. By inter-marriage.

Same objection. Over-ruled. Exception.

Q. By inter-marriage? Have you received an allotment of land as a citizen?
A. No.

Same objection. Over-ruled. Exception.

Q. As a Citizen of the Cherokee Nation, did you prior to the first of November, 1902 have any lands improved in the Cherokee Nation?
A. Yes.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with Colonel Robert B. Ross?
A. Yes.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with James Day?
A. Yes.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with the lands in controversy in these proceedings?
A. What lands?
Q. The lands that Colonel Ross claims to have purchased from Mr. Keeler.

A. Yes.

Same objection. Over-ruled. Exception.

Q. State what you know with regard to the possession of those lands and the improvements on them prior to the first day of September, 1902.
A. Well, Mr. Keeler and I owned a farm down there together and we divided it. Mr. Keeler took the East half of it, and I took the west half of it, and the lands in controversy were nearly all unimproved land and that fell to Mr. Keeler's part.

Same objection. Over-ruled. Exception.

Q. Did any other person to your knowledge lay any claims to those lands while they were in your possession?

Same objection. Over-ruled. Exception. Defendant further ob-

jects for the reason that it is immaterial, incompetent and irrelevant. Over-ruled. Exception.

A. Yes.
Q. What other person laid claims to it?
A. James Day.

Same objection. Over-ruled. Exception.

Q. Did James Day own any improvements on this lamnd?
A. No, sir, not that I know of.

Same objection. Over-ruled. Exception.

Q. Did he ever have the lands in his possession?
A. Well, I went along the road there one day and I saw some men chopping some wood, clearing up a little place, and I asked them what they were doing, and they said that they were either taking a lease or were working for James Day and I afterwards saw Day and asked him what he meant by going on there and doing this work; that it wasn't his land; that it is right adjoining Keeler's land and my field and the answer was that he didn't know that
69 we wanted it and there was no more work done, it was stopped.

Same objection. Over-ruled. Exception.

Q. It was stopped?
A. It was stopped to the best of my recollection.

Same objection. Over-ruled. Exception.

Q. Do you know anything about a trade made by Colonel Ross and Mr. Keeler with regard to this land, Mr. Johnstone?
A. Only from hearsay.

Same objection. Over-ruled. Exception.

Q. You were not there at the time?
A. No, I was not there. I do not remember, I might have been there, but I don't recollect it now.

Same objection. Over-ruled. Exception.

A. (cont.). Now, I may possibly have been there. I wouuldn't say. I wouldn't be positive. I don't know, I might have been present at the trade, but I wouldn't be positive either way.

Q. Do you recall having written a letter to the Dawes Commission on or about the 30th day of March, 1903, with regard to the N. W./4 of Section 19, Township 26-13, expressing your willingness for Mr. Keeler to file on part of that land?

A. I think I did, I think I wrote that letter. I think some of the improvements were on A. C. Knippe to me sold as a Delaware citizen and Mr. Keeler. Well, I don't know if they were A. C. Knippe's, but I owned the improvements at that time and I think Mr. Keeler had a half interest in them, or owned a certain part of them, after we divided it.

Same objection. Over-ruled. Exception.

Q. Do you remember later, on the 30th day of October, 1903, writing a letter to the Commission to the Five Civilized Tribes with regard to the particular lands in question, that is to say, the N./2 of N. E./4 of N. E./ and S. E./4 of S. E./4 of N. W./4 of Section 19, Township 26, Range 13, which you stated had been let by Mr. Keeler—had been sold by Mr. Keeler to Mr. Ross? Do you remember that letter?

A. I might have written such a letter, sir, I think possibly I did.

Same objection. Over-ruled. Exception.

(Now I will state here that the original of those letters that I have just described were filed in the contest case, and the- were in the files in the Indian Office at Washington. I have here a certified copy of these letters, with other papers from the Commissioner of Indian Affairs, or Acting Commissioner of Indian Affairs, under the Seal of the Indian Office. I want to offer all of these exhibits to the proceedings before the Commission, and we couldn't get the originals. This is the best we could do. The Statutes of the United States make the certified copy of files of the records of the Indian Office evidence in United States Courts and——)

Defendant moves to strike the statement of Counsel for Plaintiff from the record for the reason that he is not under oath and that this record is a record of testimony of evidence and not of argument or statement of Cou-sel.

Motion sustained. Exception.

(I will offer now certified copies of letter of March 30th, 1903, to the Honorable Dawes Commission by William Johnstone the originals being Contestants' Exhibit A in the Contest case in the Dawes Commission, and certified copy of letter of October 30th, 1903, to the Commission to the Five Civilized Tribes by William Johnstone, the originals being Contestants' Exhibit B to the original Contest before the Commission to the Five Civilized Tribes, marked Complainant's Exhibit 7-A. B.

Defendant Day objects to the introduction of plaintiff's Exhibit 7-A. B. for the following reasons:

L. Because the same is incompetent, irre*val*ent and immaterial.

2. Because the same is not properly authenticated as required by law.

3. Because the same are not the best evidence of the in-
70 struments which they purport to represent.

4. Because said instruments have not been properly identified.

5. Because no statement of the witness, William Johnstone, is binding upon the alleged grantor of purchaser of the bonds in controversy by the plaintiff.

Objection. Over-ruled. Exception.

By WITNESS: What was it you wanted to know?

Q. I will ask you now if, having read these copies, you recall having written the letters?

A. Yes, sir. I recall having written letters similar to that, or both of them.

Same objection. Over-ruled. Exception.

Q. Well, do you know whether Mr. Keel-r, or any member of his family selected any of the lands that you described in that first letter of March 31st for allotment?

Same objection. Over-ruled. Exception. Defendant further objects on the ground that the question is irrevalent, incompetent, and immaterila, and for the further reason that there is better evidence of the lands upon which Keelers have filed.

Objection over-ruled. Exception

A. Well, I can't answer that positively.
Q. You say that you don't know of your own knowledge?
A. I don't know of my own knowledge, only what I know from hearsay.

Same objection. Over-ruled. Exception.

Q. Were you ever before the Commission to the Five Civilized Tribes as a witness in a contest between the defendant, Day and any member of Mr. Keeler's family involving any part of the lands in the NW/4 of Section 19?

Same objection. Over-ruled. Exception. Defendant Day further objects as wholly irrevalent, incompetent and immaterial, and referring to other causes and not this land.
Objection. Sustained. Exception.

A. Well, I don't remember whether I appeared in Mr. Keeler's behalf or in Mr. Ross's behalf.
Q. I mean in any other controversy?
A. I do not recollect about that.

Same objection. Over-ruled. Exception.

Q. From what source did you get your information, Mr. Johnstone, from which you wrote the letters of October 30th, 1903, which—the plaintiffs' exhibit 7-B.?

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason calls for an answer that will be hearsay evidence, and for the further reason the *the* question is irrevalent and incompetent.
Objection. Over-ruled. Exception.

By WITNESS: What was the question now?
Q. From what source did you get your information that Mr. Keeler had let Mr. Ross have this land?
A. I think from Mr. Keeler.

Defendant Day moves to strike the answer of the witness from the record for the reason that it is hearsay evidence.
Motion sustained. Exception.

Q. For what reason do you make the statement in your letter to

the Commission that this land was not in you- Delaware Segregation?

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that the same is irrevalent, incompetent and immaterial.

Objection over-ruled. Exception.

A. In the first place the land never was put into the Delaware segregation by myself as an inter-married Delaware citizen, but was segregated by James Day, from what I could learn.

(By Mr. VEASEY:) For himself, Mr. Johnstone?

—. Yes, sir, himself.

A. (cont'd.) And that was the reason I know it couldn't properly belong in the Delaware segregation.

71 Q. Who owned the improvements on this land at the time the Delawares were authorized to segregate lands?

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that the same is incompetent, irrevalent and immaterial. Over-ruled. Exception.

A. I think Mr. Keeler and myself did. I did by virtue of my marriage and Mr. Keeler by virtue of his Cherokee citizenship.

Defendant Day moves to shrike from the record the answer of witness for the reason that it is a conclusion of law and not a statement of fact.

Motion over-ruled. Exception.

Cross-examination by JAMES A. VEASEY:

Q. Mr. Johnstone, you are familiar with this tract of land that is in dispute?

A. Yes, sir.

Q. Do you know that it is in two separate tracts, one a twenty acre and one a ten acre tract?

A. Yes, sir.

Q. In your direct examination, you testified that it was wholly unimproved excepting for a small tract thereof?

A. Yes, sir.

Q. And as a matter of fact that improved part was about an acre and a half or two acres on the West ten of the North twenty which was included in a field forme-ly owned by yourself and Mr. Keeler?

A. Yes, sir.

Q. You have no personal knowledge of any trade between Mr. Keeler and Mr. Ross, of your own personal knowledge?

A. Well, now, I couldn't be positive one way or the other.

Q. They both might have talked about it, but you were not actually there when the trade was made?

A. I couldn't say, I do not think I was.

Q. Now, Mr. Johnstone, would not this condition that you have just described exist on or about the first day of March, 1904; that there was no more on the lands involved except that acre or acre abd a half which was in the old field of yourself and Mr. Keeler?

A. When was that?

Q. March 1st 1904.

A. Well, I couldn't tell you that. Mr. Keeler and myself we had our land—we had all the place fenced, that whole bottom tract and removed the posts and trees from the whole bottom had fenced it under our tenenat down there. I don't know when the fence—I don't remember when the fence was taken down, or anything about it.

Q. You do know this, that it was taken down some years before 1904, was it not?

A. I think it was, yes, sir.

Redirect examination by KENNETH S. MURCHISON:

Q. Can you state wh-ther that fence was taken down prior to November 1st, 1902 or before that?

A. No, sir. I couldn't say, they had it fenced and used it as a pasture,—the man who lived on the place.

Same objection. Over-ruled. Exception.

Q. Do you recall now whether that fence was there on the first day of September, 1902?

A. I can't remember, sir.

Same objection. Over-ruled. Exception.

Recross-examination by JAMES A. VEASEY:

Q. Mr. Johnstone, as a matter of fact, wasn't that fence put there by a man named Stevens and taken away by him?

A. It might have been put there by a man who lived on the place.

72 Q. Do you know or do you not know [illegible] tena-ts on that place took away that fence?

A. I can't remember which tena-t, Mr. Keeler's or mine put it there. One of the tenants put it there as I stated.

Redirect examination.

By KENNETH S. MURCHISON:

Q. Did he put it there with your authority, Mr. Johnstone?

A. Yes, he asked me about it, sir.

Same objection. Over-ruled. Exception.

Q. Do you know who made the original improvements and plowed the field, Mr. Johnstone?

A. Well, when I traded for the place, there was a little field,—an old field which was part of this land in controversy. All of the improvements of this land in controversy was that little old field that was there in 1882, when I came there. Then afterwards, why we let Mr. T. A. Stevens have a lease on that and he fenced the big field and plowed it out and put it in cultivation. It was purchased, it is my impression, from a citizen of the Cherokee Nation.

Same objection. Over-ruled. Exception.

Q. Who was he, do you remember?
A. Either Bronson or her brother, I do not — which. It was originally the olf Halfoon place. To go away back into A-cient history, I bought a little piece of land right on the river where I lived from a man called Bill Halfoon, a Delaware. Why, when getting that place, I wanted a litle place down opposite it and then I bought that little piece down in the lod bottom from a Delaware Indian by the name of Washer Marshall. Then I traded that place down in the bottom to Halfoon for the place up here close to town and built my house on the place we got from Halfoon where I live now. Then Halfoon died and his widow and daughter, who was Bronson's wife, wanted to sell the place and I bought their place back from them. Mr. Keeler and I did together in the store. We were running the store then.

Same objection. Over-ruled. Exception.

Q. They traded it back, you say?
A. Yes sir.

Same objection. Over-ruled. Exception.

Recross-examination.

By JAMES A. VEASEY:

Q. Mr. Johnstone, in reference to this place, and the various purchases that were made, you refer to that farm an acre and a half of which was under cultivation on one of the ten acre tracts
A. Yes, sir. That little piece in cultivation.

COUNSEL FOR DEFENDANT: That is all.
COUNSEL FOR PLAINTIFF: That is all.

Witness dismissed.

Plaintiffs offer GEORGE B. KEELER as witness

Defendant James Day objects to the introduction of any evidence in this cause for the following reasons:
1. Because plaintiffs' complaint does not state a cause of action.
2. Because there is a misjoinder of causes of action and a misjoi-der of parties plaintiff herein.
3. Because the land in dispute has been determined by the Secretary of the Interior to be the allotment of the defendant by decision rendered by the Secretary of the Interior on the 31st day of May, 1907 and by the decision of the said Secretary on the 16th day of August, 1907 denying a motion for a review of said decision of May, 31st, the effect of which said several decisions is to make the facts found in said decisions conclusive upon the parties thereto.
4. Because no evidence can be taken in this case unless there are allegations of fraud in the taking of the testimony before the Department of the Interior, or unless there are allegations of mistake in the taking of the said testimony specifically pointing out the

mistake relied upon by the plaintiffs, neither of which allega-
73 tions of fraud or mistake have been set out in plaintiffs' complaint.

Counsel for plaintiffs states that as to exception of Counsel for defendant Numbers 1 and 2, said questions are res judicata, having been decided by the District Court forme-ly having jurisdiction of this cause at Muskogee on the 5th day of August, 1908.

As to the third exception of Counsel for defendant, it is immaterial, irrevalent and does not affect this issue, and contains conclusions of law denied by the plaintiffs and of which the referee has no jurisdiction, and because plaintiffs' Bill of Complaint sufficiently alleges facts to constitute a cause of action as finally determined by the presiding judge of the Third Judical District of Oklahoma.

Therefore, Counsel for plaintiffs moves to strike from the record the exceptions of defendant's Counsel.

Referee over-rules the motion of plaintiffs' Counsel to strike from the record the exceptions of defendant's Counsel.

To which plaintiffs except.

Defendant moves to strike from the record the statement of plaintiffs' Counsel in responce to defendant's objections to the introduction of any testimony on the ground that such statement is incompetent, irrevalent and immaterial.

The referee sustains the motion of defendant's Counsel to strike from the record statement by Counsel for complainant.

To which plaintiffs except.

The referee over-rules the objections of the defendant to the introduction of any evidence solely on the ground that it is not within his jurdsdiction to pass upon matters of law involved in thid case.

To which defendant excepts.

Whereupon, plaintiffs offer GEORGE B. KEELER as witness for plaintiffs, who being sworn is offered as witness.

Defendant's same objection. Over-ruled. Exception.

Defendant further objects on the ground that the questioning is irrevalent, incompetent and immaterial and for the further reason that the decision of the Secretary of the Interior in regard to the land in controversy is conclusive as to the facts which are the basis of this cause of action.

Objection. Over-ruled. Exception.

Direct examination.

By KENNETH S. MURCHISON:

Q. State your name, age and residence.

A. George B. Keeler, fifty-eight years old; residence Bartlesville, Oklahoma.

Same objection. Over-ruled. Exception.

Q. Are you a citizen of the Cherokee Nation, Mr. Keeler?

A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Are you the George B. Keeler who was in partnership with Mr. William Johnstone who testified in this case?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with Robert B. Ross?
A. Yes sir.

Same objection. Over-ruled. Exception.

Q. Are you acquainted with James Day?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Do you know the lands that were involved in this controversy?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. What if any trade did you have with Robert B. Ross with reference to the improvements on these lands some years ago?
A. I told Mr. Ross that I would give him a Bill of Sale to thirty acres of land down there provided he would give the Cudahy
74 Oil Company a lease on it.

Same objection. Over-ruled. Exception.

Q. And did you give him the Bill of Sale?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Covering the thirty acres?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. At the time the Bill of Sale was given who owned the improvements on that land?
A. I owned them.

Same objection. Over-ruled. Exception

Q. Will you state how it came that you owned them at that time?
A. Well, about twenty years ago I and Mr. Johnstone made a lease with a man by the name of Stevens, Mr. T. A. Stevens, to put a certain amount of land down there, to put it in cultivation for a term of years and to start with we purchased, improved, and leased a small claim in there from a man by the name of William Halfoon. Then we made a lease with one Stewart and he enlarged the place,—made a bigger place of it. Lived there a number of years and turned the place back to us at the expiration of his lease.

Same objection. Over-ruled. Exception.

Q. Then how did you dispose of the interest that Mr. Johnstone had there in that?
A. Mr. Johnstone Bill of Saled me,—he gave me a Bill of Sale for eighty acres, there was eighty acres in there.

Same objection. Over-ruled. Exception.

Q. That was on the division of your interest?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. What improvements were there, if you recall, about the time you made this trade with Mr. Ross?
A. About half of that ground was in cultivation and fenced with a seven wire fence,—seven or eight. The fence was a wire fence.

Same objection. Over-ruled. Exception.

Q. What other fence did you have in that bottom besides that around the field?
A. At one time we had a wire fence that enclosed that whole bottom. We used it as a pasture.

Same objection. Over-ruled. Exception.

Q. At the time you had the fence around the whole bottom did any other person claim that land?
A. I never heard of any one claiming it.

Same objection. Over-ruled. Exception.

Q. Do you remember when that fence was taken away, Mr. Keeler?
A. No, sir. I don't remember just when it was taken away.

Same objection. Over-ruled. Exception.

Q. Was it taken away before the first day of July, 1902?
A. Well, I couldn't say, I am not sure, but I don't think it was. I think there was part of the old fence that was there quite a while.

Same objection. Exception. Over-ruled. Exception.

Q. You remember when the Allotment Act was passed?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Was that fence there at the time, if you recall, that this allotment Act was passed?
A. Well, I couldn't say whether it was or not. I think there was a portion that still remained there after that Allotment Act.

Same objection. Over-ruled. Exception.

Q. Now, I will ask you to examine a paper which purports to be a certified copy of a Bill of Sale dated November 1, 1902 from you to Robert B. Ross upon said lands and ask you whether the lands intended to be conveyed by that are the lands that are now in controversy in the NW/4 of Section 19, Township 26, Range 13?
A. This does not describe the land that I sold to Mr. Ross.

Same objection. Over-ruled. Exception.

75 Q. Please state what it is in that paper that makes it an improper description.

A. You told me that this described land in the Osage Nation. The first twenty acres there is in Range 12, you will notice, Section 19.

Same objection. Over-ruled. Exception.

Q. Can you say whether or not that mistake occurred in the original Bill of Sale

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that the question is an attempt to vary the terms of a written conveyance by oral testimony.

Objection over-ruled. Exception.

A. I couldn't say whether it occurred or did not occur.

A. Well, did you give a Bill of Sale to Colonel Ross on the first day of November, 1902, upon the lands in controversy?

A. I bill of Saled Colonel Ross thrity acres of land down in that bottom. I do not remember the date, the Bill of Sale will show that.

Defendant moves to strike out the question and answer on the ground that the Bill of Sale itself is evidence of the fact the question seeks to bring out. Over-ruled. Exception.

(I will offer now, at this point, in connection with the testimony of the witness, the certified copy of the Bill of Sale from George B. Keeler on November 1st, 1902 to Robert B. Ross, being the Bill of Sale upon which Robert B. Ross claimed the right previously thereto owned by Keeler in the improvements on the lands in controversy, the original being in the Office of the Commissioner of Indian Affairs, and this copy is certified to by the Acting Commissioner of Indian Affairs on November 13, 1907, under the Seal of the Office of Indian Affairs in Washington, and Marked Plaintiffs' Exhibit, 7-C.)

Defendant Day objects to the introduction of Plaintiffs' Exhibit 7-C, for the following reasons:

1. Because the same is irrev*a*l*e*nt, incompetent and immaterial.
2. Because same has not been identified as required by the rules of evidence.
3. Because the same does not refer to the lands in controversy.
4. Because the same has not been authenticated in the manner required by law.

Defendant's objections over-ruled. Exception.

Q. Mr. Keeler, do you recall having written a letter of the 5th of April, 1904 to Colonel Robert B. Ross with regard to this allotment, or these lands?

A. I do not remember of writing this letter. I suppose I wrote it, my name is signed to it.

Same objection. Over-ruled. Exception.

Q. Do you recollect any of the facts stated in that letter, and can you state now whether they were correct,—the facts stated?

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that the question is irrev*a*l*e*nt, imma-

terial and incompetent and for the further reason that the purpose of the plaintiff is to identify said land for the purpose of evidence in this case, and that the question is incompetent to that end.

Objection sustained. Exception.

Q. Do you remember whether or not James Day had fenced any of those lands that was sold to Colonel Ross about the 5th day of April, 1904,—whether he had fenced any of it?

A. Yes, sir. Well, I couldn't say now whether he had or not.

Same objection. Over-ruled. Exception.

Q. Do you remember whether Buford had fenced in twenty acres of the thirty that you sold Colonel Ross about that time?

A. Well, I couldn't say that. Whatever that letter says must be about the sum and substance of it. That has all passed out of my mind long ago.

76 Same objection. Over-ruled. Exception.

Q. You don't recall you say writing this letter to Colonel Ross about that time?

A. No, sir. I don't recall writing that letter, but I see my name is signed to the letter and I suppose I wrote it, but it would be impossible for me to recall my letters I have written for the last nine or ten years.

Same objection. Over-ruled. Exception.

Q. You would of course, recognized your signature if it was there?

A. Yes, sir.

(I will ask permission of the referee to obtain from Washington, if I can, this original letter, which I will ask to have filed upon its identification by the witness. At present I will offer the certified copy of the contestant's exhibit also the original being attached to the testimony taken by the Commission to the Five Civilized Tribes at the hearing of the contest between these plaintiffs and the defendant Day, being Cherokee Contest No. 1181 and 1182 Consolidated, to be marked in this proceeding plaintiffs' exhibit 7-D.)

Defendant Day objects to the introduction of Plaintiffs' Exhibit 7-D. on the ground that it is incompetent, irrevalent and immaterial. Objection, over-ruled. Exception.

Cross-examination.

By JAMES A. VEASEY:

Q. Mr. Keeler, you realize, do you that there are two separate tracts of this land, one twenty acre tract and one ten acre tract?

A. No, sir. I supposed there was but one case. I didn't know there were two separate cases.

Q. You know that the two tracts are separate, however, one a twenty acre tract and one a ten, also half a mile between them?

A. No, sir.

Q. Did you think the land was all together?

A. I did, yes, sir.

Q. So far as the official description of these lands are concerned, you knew nothing about that?

A. Very little.

Q. You understand only that you simply would have let Ross have thrity acres of land somewhere in that bottom if he executed an oil lease to the Cudahy Oil Company as you testified?

A. He was to have leased to the Cudahy Oil Company the lands provided I let him have them. I Bill of Saled the land to him.

Q. What was the consideration which he was to give you for this transfer of the thirty acres of land in that bottom?

A. He was to give the Cudahy Oil Company a lease on that and.

Q. What were you to get out of it?

A. I was to get 2½ per cent of the royality from the Cudahy Oil Company.

Q. Did he ever execute that lease?

A. No, sir. He never did.

Q. Was there any money consideration to be paid, Mr. Keeler,—a money consideration for the land?

A. No, sir. He was to make leases on both places I sold him.

Q. Did Mrs. Fannie D. Ross ever execute a lease on the *the* part she filed on?

A. No, sir, she never did.

Q. Now, do I understand from you that this transfer was not to be effective unless they executed leases on those tracts of land to the Cudahy Oil Company?

A. Not unless they do*en* as the- agreed to.

Q. Now, Mr. Keeler, Mr. Ross in his testimony set forth that you gave him the lines in his filing upon this thirty acres of land without any question, is that true or not?

A. No, sir. That *it* not true.

Q. This letter here mentiones that the Cudahy people would have to pay the expenses of fighting this contest?

A. If that had been given it was between myself and Mr. Ross that the Cudahy Company would, and I mentioned the
77 Cudahy people in the letter to him.

Q. Mr. Keeler, you know don't you that there is one twenty acre tract of this land in controversy which includes a small part of the old field together with such part of the fence as is necessary to enclose that owned by yourself and Mr. Johnstone?

A. Well, I was under the impression that about one half of it was in cultivation.

Q. Half of the twenty acres, Mr. Keeler?

A. Half of the entire tract, half of thirty acres.

Q. As a matter of fact, Mr. Keeler, did you not have a definate knowledge of the exact improvements either of cultivated land or of fencing that was on this special ten acres at the time you sold it, do you?

A. No, sir.

Q. Now, you can't testify, can you, that any part of this old Stewart fence was on this land or enclosed this land at the time of this sale to Mr. Ross, can you?

A. I think part of the old fence was still standing there.
Q. Well, Mr. Keeler, will you testify that any part of this old fence was standing on the first day of March, 1904?
A. Well, I couldn't say for certain that it was. I didn't go down there very often.

(Plaintiffs move to strike the question and answer because it is not materail and we have shown by this witness that this trade took place some time in 1902. Over-ruled. Exception.)

Q. Mr. Keeler, did you consider this trade for whatever improvements you had on this thirty acres with Ross as off when he refused to make the lease to the Cudahy Oil Company?

Plaintiffs object to that question because this witness hasn't testified that Mr. Ross ever refused to make a lease. He says he hasn't made the lease. Over-ruled. Exception.

A. As far as I was concerned it was off.
Q. Mr. Keeler, have you ever asked Mr. Ross to comply with his contract and give a lease to the Cudahy Oil Company?
A. Yes, sir.
Q. Did he do so?
A. No, sir.
Q. Did he refuse to do so?
A. He refused to do so.
Q. Mr Keeler have you ever received a dollar or a penny of consideration for this transfer from yourself to Mr. Ross?
A. Not one penny.
Q. Have you had other dealings with Mr. Ross of a business nature, since this transaction?
A. Yes, sir.
Q. What was the character of them?
A. I signed a note at the Bartlesville National Bank and had to pay. I endorsed it as security.
Q. What was the amount of that note?
A. $150.00 and interest.

Plaintiff objects as improper cross examination.
Objection over-ruled. Exception.

Redirect examination.

By KENNETH S. MURCHISON:

Q. Mr. Keeler, do you know whether or not Colonel Ross has ever been in position so that he could or his wife, Fannie D. Ross, could make a lease on this land to any one?
A. I do not — why he couldn't.
Q. Do you know whether or not either Colonel Ross or Mrs. Ross ever received a certificate for any of these lands from the Commission to the Five Civilized Tribes?

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that it is incompetent, irrevalent and im-

material and for the further reason that it is not the best evidence. Objection over-ruled. Exception.

A. I do not know.

Q. About that note, Mr. Keeler, do you think that your statement that the note was for $150.00 is the exact amount of the note?

A. Yes, sir and the interest. The note was for $150.00 if I remember right. I have the note in my possession.

78 Same objection. Over-ruled. Exception.

Q. Was there any property turned over to you from which the credits were to be made upon the note? Or any lands or anything of that kind?

A. No, sir.

Counsel for Plaintiffs: That is all.

Counsel for Defendant: That is all.

Witness dismissed.

The meeting here adjourned until 1:00 o'clock P. M.

The meeting convened at 1:00 o'clock P. M. Plaintiff present by attorney, Kenneth S. Murchison. Defendant present by attorney, James A. Veasey.

Robert B. Ross recalled by plaintiff for further direct examination.

Redirect examination.

By KENNETH S. MURCHISON:

Q. Colonel Ross, you heard the testimony of Mr. Keel-r this morning with *the* regard to the matter of making a lease to the Cudahy Oil people. Have you ever had a certificate to any of the lands involved in this controversy?

A. No, sir.

Same objection. Over-ruled. Exception.

Q. Have you ever been in a position to make a lease on this land to any one for oil or gas purposes?

A. No, sir.

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that it calls for a conclusion of law. Over-ruled. Exception.

Q. Did you agree at the time you secured the Bill of Sale to make a lease to the Cudahy Oil Company?

A. No sir.

Same objection. Over-ruled. Exception.

Q. What was said to you, or what was done with regard to securing a lease from you for the Cudahy Oil Company and him?

A. After the contest was brought, they proposed the *the* Cudahy Oil Company would foot all expenses if I would give them the lease.

Same objection. Over-ruled. Exception.

Q. Who made the proposition to you?
A. Why, Mr. Givens.

Same objection. Over-ruled. Exception.

Q. Of what palce?
A. Muskogee. Well, he made it at Tahlequah.

Same objection. Over-ruled. Exception.

Q. Well, I know, but he lives at Muskogee?
A. Yes, sir.

Same objection. Over-ruled. Exception.

Q. Had anyone spoken to you previously to that time about making a lease to the Cudahy Oil Company?
A. No, sir, only that letter which is on file here, what I got from Mr. Keeler.

Same objection. Over-ruled. Exception.

Q. You refer to the letter of April 5th, 1904?
A. Yes, sir.

Same objection. Exception. Over-ruled. Exception.

Q. When did you apply to have these lands allotted to you and your wife?

Same objection. Over-ruled. Exception. Defendant Day further objects for the reason that the records of the Five Civilized Tribes is the best evidence. Objection Over-ruled. Exception.

A. Why, I think it was along the first of June or July somewhere.
Q. In what year?
A. 1904.

Same objection. Over-ruled. Exception.

Q. What did you discover as to the condition of this land when you made your application?
A. That Mr. Day had filed on it.

Same objection. Over-ruled. Exception.

79 Q. What did you do?
A. Well, I entered contest proceedings.
Same objection. Over-ruled. Exception. Defendant Day moves to strike re-direct examination from the record for the reason that it has already been gone into. Objection over-ruled. Exception.

Q. Was it after or before you filed you- contest that this proposition to make a lease to the Cudahy Oil Company was made to you?
A. It was quite a little while afterwards.

Same objection. Over-ruled. Exception.

Recross-examination.

By JAMES A. VEASEY:

Q. Mr. Ross, you stated yesterday that Mr. Keeler gave you the right to file on this land, is that the case?

A. Yes, sir.

Q. Why was it that the Bill of Sale which has been referred to in the evidence recites a consideration of One Hundred Dollars.

A. Well, he did start out to ask one hundred dollars for the place and then afterwards he said he would give it to me.

Q. You mean to say, Mr. Ross, that there was no understanding between you and Mr. Keeler at the time you entered into that Bill of Sale to the effect that in consideration of his making that Bill of Sale to you and your wife, you would make a lease to the Cudahy Oil Company out of which he would get 2½ per cent of the out?

A. Yes, sir. I am positive about that. There was no provision at all.

Counsel for Defendant: That is all.
Counsel for Plaintiff: That is all.

Witness dismissed.
Plaintiffs rest.

The defendant Day demurrs to the evidence introduced by the plaintiff for the following reasons:

1. Because under the law applicable to this case the Court does not have jurisdiction to inquire into the facts when the same have been adjudicated by the Secretary of the Interior in a land contest case, unless the allegations *amde* in the complaint is that fraud has been perpetrated by the opposite parties in the process of the examination into the facts by the Officials of the Land Office, and the further allegations made setting out specifically the character of the fraud perpetrated or that a gross mistake was made by the Secretary of the Interior in the examination of the evidence and in the conclusions as to the facts which gross mistake should be specifically set out in the complaint.

2. For the reason that the evidence introduced by the plaintiffs does not show a cause of action against this defendant.

Demurrer over-ruled. To which defendant Excepts.

Defendant Day now offers in evidence a copy of the decision of the Secretary of the Interior rendered on the 31st day of May, 1907 in Cherokee Allotment Case Numbers 1181 and 1182, wherein Robert B. Ross and Fannie D. Ross, the plaintiffs in this action, were parties contestants, and wherein James Day, the defendant in this action, was party contestee, and which said decision awarded all the lands in controversy whoih was the subject of that contest, to the defendant, James Day who in said case was party, contestee, and we would ask leave of the referee to file this certified copy of said decision with the record in this case, the same to be marked Defendant's exhibit A.

And defendant Day further offers in evidence the decision of the Secretayr of the Interior in the same case wherein the same
80 land was in controversy with the same parties thereto, rendered on the 16th day of August, 1907 denying a motion for a review of the said decision of May 31st, 1907 awarding the land in controversy to the defendant, whcih said motion has been filed by the plaintiffs to this action, who were thw parties contestant in said Contest Case above referred to, and defendant requests leave of the referee to submit a duly certified copy of the said decision, the same to be received in evidence and designated as defendant's exhibit B.

Referee grants leave to file said papers in a reasonable time.

Defendant offers SAMUEL WHITETURKEY as witness, who after being duly sworn testifies as follows:

Direct examination.

By JAMES A. VEASEY:

Q. State your name, age and residence.
A. Samule Whiteturkey; forty-nine years old.
Q. Where do you live?
A. I live about two miles east of Bartlesville.
Q. Are you a Delaware-Cherokee citizen?
A. A Delaware.
Q. How long have you been living around Bartlesville?
A. Well, about thirty-five years, I guess.
Q. Do you know James Day?
A. Yes, sir.
Q. How long have you known him?
A. I have known him thirty-five or forty years, I guess.
Q. Do you know where that bottom in the Caney River is near the Toll Bridge, and east of the old Johnstone-Keeler farm there by the river?
A. Yes, sir.
Q. How long have you know- that bottom?
A. I have known it about thirty-five years, I guess.
Q. Have you ever heard James Day as a citizen of the Cherokee Nation claim that bottom?
A. Yes, sir.
Q. How long have you heard him make that assertion of title to that bottom.
A. I think about seven years.
Q. Did you ever see him do any work in that bottom?
A. I seen him cut some timber there.

COUNSEL FOR DEFENDANT: That will do.

Cross-examination.

By KENNETH S. MURCHISON:

Q. Did you ever see any other person cutting timber there?
A. Not that I know of.
Q. Did you ever see Jim Day cutting timber there on the N/2 of Ne/4 of NW/4 of Section 19, Township 26, Range 13?
A. Is that North?
Q. That is right on the North line of the Section.
A. Yes, I have seen him cutting on that piece of land.
Q. I think that is the same piece that you have seen him cutting on?
A. Yes, sir.
Q. How far do you say from that land is the Johnstone-Keeler field?
A. Two or three hundred yar-s, I guess.
Q. Two or three hundred yards from the land?
A. Yes, sir.
Q. How far is that from the bridge?
A. Taht is about two hundred yards, I guess.
Q. About two hundred yards. What improvements if any did Mr. Day have on any or either of these tracts of land, do you know?
A. He had some fence around there.
Q. Around where?
A. Around this land.
Q. When did he have this fence there?
A. It has been six or seven years, I guess. Some where along there.
81 Q. Did he have any fence on that land prior to September 1, 1902?
A. 1902?
By Mr. VEASEY: It would be six years ago.
A. Yes, the fence was there.
Q. Whose fence was it?
A. Day's.
Q. Did you ever know of a fence being there to enclose a pasture that was owned by Johnstone and Keeler?
A. All I know, sir, Johnstone-Keller owned the place where that field fence was. That is all I know about it.
Q. Well, did you know about any fence that was put there *by* so as to enclose that bottom as pasture by Johnstone and Keeler?
A. No, sir, I didn't.
Q. Then did you know there was a fence put there by Johnstone and Keeler or by their agents?
A. Pasture fence?
Q. Yes.
A. Not that I know of. I always thought it was Jim's fence.
Q. You do not know whether Johnstone or Keeler put any fence there or not?
A. No, the field fence, it has always been there.

Q. If, Mr. Johnstone, testified that he had the whole bottom fenced in for pasture, are you prepared to deny that?

A. I don't know anything about him, or that he had any fence there at all.

Q. The fact of the matter is that you really don't know of your knowledge of any improvements in that place belonging to anybody, do you?

A. Except that I thought that Jim Day fenced there.

Q. Did you see Jim put the fence there?

A. I thought that he put it there.

Q. You do not know that he did?

A. I thought theat he did.

Q. Do you know of your own knowledge that he put the fence there?

A. I didn't see him put it there.

Q. Now where was this fence that you speak of that you thought he put there? What part of the bottom was it on?

A. Well, it was nearly clear around.

Q. Was that on the east or west side of the river?

A. The west side of the river.

Q. When did Mr. Day tell you that he had put this fence around this land?

A. That has been about six years ago. Some where along there. About that.

Q. About six years ago?

A. Yes.

Q. How far from this land do you live?

A. I live about a mile and a half I guess.

Q. I- what direction.

A. Across the river, along section 17, about one and a half miles across the river.

Counsel for plaintiffs moves to strike from the record the testimony of this witness, as the witness shows that he does not know anything about the facts to which he testifies but has obtained his information from the defendant Day solely.

Objection over-ruled. Exception.

Witness dismissed.

Defenda-t offers JEFFERSON D. SARCOXIE as witness who after being duly sworn testifies as follows:

Direct examination.

By JAMES A. VEASEY:

Q. State your name.

A. Jefferson D. Sarcoxie.

Q. Your age.

A. Forty-three.

Q. Where do you live, Mr. Sarcoxie?

A. I live south of Bartlesville, about two miles.
82 Q. Are you a Delaware citizen?
A. Yes, sir.
Q. Do you know James Day?
A. Yes, sir.
Q. How long have you known him?
A. I have known him all my life, about forty-years you might say.
Q. Do you know -*ehre* this bottom land is? Thirty acres of which is in litigation between Robert B. Ross and Fannie D. Ross and James Day, the same land being located between the old Johnstone-Keeler improvements in Section 19 and the Caney river? Do you know where that bottom is?
A. Yes, I know about where it is.
Q. How far do you live from that land?
A. About a half of mile, some where along there.
Q. How long have you lived in the neighborhood of that bottom land,—claimed title to it?
A. Why he said he claimed it.
Q. Did you ever see James Day, either James or Clarence cut any timber there?
A. I seen Clarance Day cut timber there, and rig timbers or something like that.

By Mr. MURCHISON:

Q. What sort of timber did you say that they were cutting?
A. Rig timber or posts. I saw them making posts one time.

Witness dismeissed.
Counsel for plaintiffs moves to strike out the testimony of the witness as irr*valant*, immaterial, proving nothing of the issues in this cause. Over-ruled. Exception.

Defendant offers JAMES DAY as a witness who after being duly sworn testifies as follows:
Q. State your name.
A. James Day.
Q. How old are you.
A. I am about fifty-two.
Q. Where do you live?
A. I live about two miles from here.
Q. Are you a Delaware-Cherokee citizen of the Cherokee Nation?
A. No, I am a Delaware.
Q. Are you a Citizen of the Cherokee Nation?
A. Yes, sir.
Q. Are you the defendant in this case which is being tried?
A. Yes.
Q. You know the land that is involved in this suit?
A. Yes, sir.
Q. Now, have you received a certificate or certificates of allotment from the Government showing the allotment of this land to you?

A. Yes, sir.

Q. Do you have those certificates with you? Hand them to me will you?

(Witness hands certificates to Counsel.)

—. The certificates which you have handed me are the certificates received from you by the Dawes Commission?

A. Yes, sir.

Defendant offers in evidence Allotment certificates No. 11367 dated November 11, 1907 at Muskogee, certifying that on May 27, 1904 said lands including a portion of the land involved in this suit was allot-ed to James Day, and the defendant will further ask that said allotment certificates be received in evidence and marked Exhibits C and D respectively.

Q. How long have you known this land?

A. Well, I hanve known it for over thirty-years.

Q. Have you lived in the neighborhood of the land for any great length of time?

A. I have lived there over thirty years, hardly a quarter of a mile.

By Mr. MURCHISON: How was that question.

Question was repeated.

Q. How far was the first farm you had in this country from this bottom land that is in litigation?

83 Plaintiffs objects as irr-*valen*t, incompetent and immaterial. Objection over-ruled. Exception.

A. It was hardly one hundred yards from this ten acres, right across the river. It was the first farm I owned.

Q. Had you at any time prior to September, 1902 used this land for any purpose?

A. I used it all the time, using timber out of it.

Q. By all the time, how long do you mean?

A. Well, while I lived there, I lived quite a while, I couldn't say how lang.

Q. About how many years?

A. About thirty years *pre*haps, longer than that.

Q. Now, have you ever put any improvements on this land other than cutting the timber whcih you just referred to?

A. Well, I put fence around there.

Q. When did you put a fence around this land?

A. Well, I put the fence around there four or five years, something like that.

Q. Well, did you put the fence around there before you filed on the land?

A. Yes, I put the fence around there before I filed.

Q. Did you put this fence around this land the same year you filed?

A. I can't say exactly, but it was about that time.

Q. In what month did you put the fence around the land?
A. I think I put it there the first of March.
Q. Now, was it shortly after that time that you filed on the land, shortly after the first of March?
A. Yes, it wasn't very long after that.
Q. What kind of a fence did you put around this land on the first of March of that year?
A. We put a two wire fence around it.
Q. Is this thirty acres which is in controversy in one tract of land, or is it in two tracts?
A. It is in two tracts.
Q. Now, two tracts of how large?
A. One of twenty acres and one of ten.
Q. Now, with respect to the twenty acre tract is that north or south of the ten acre tract?
A. It is north.
Q. Now where did you begin fencing as you say you did on the first day of March of the year you filed?
A. We commenced on the northwest corner, going east.
Q. Of what tract?
A. Of the twenty acres.
Q. How far east did you go?
A. We went a quarter.
Q. Then which way?
A. Then we went south and a little east down to the Toll Gate.
Q. Then which way did you go?
A. Then we went north to the other corner, South-west and a little West and South.
Q. Now, you went South-West to the Toll Bridge and then a little South-West, about how far in all South did you go?
A. We must have went a couple of hundred yards.
Q. How far south did you go altogether in making this fence?
A. That one strand of fence run to the South corner. It was nearly a mile.
Q. Then which way did you go with the fence from the corner?
A. Why, from the south-east croner, we went west.
Q. How far?
A. Why a quarter. Then we went north to the first corner we started from.
Q. Now in going north from the first corner you started from did you build your fence near a fence that was there belonging to Kohnstone and Keeler?
A. Yes, we run right along the fence.
Q. After you had built the fence the way you described did that enclose all the land in controversy?
A. Yes, sir.
Q. How many wires were in that fence?
A. Two wires.
Q. How far apart were the posts?
A. They was some twenty feet, some a little wider than that.

Q. Now after that did you put any other improvements inside of the enclosure that you had made by the fence?

A. I built a house on the ten acres.

84 Q. On what ten acres, the south ten?

A. Yes, sir.

Q. What kind of a house was that?

A. Box House.

Q. How many rooms?

A. Three rooms, two rooms below and one room up above.

Q. About how long after the building of the fence was it that you built the house?

A. It was right at the time. I couldn't describe when very well.

Q. Did you and your family move into this house after you built it?

A. Yes, sir.

Q. How long did you continue to live in the house?

A. We lived there over a year, I never exactly knew, but it was over a year.

Q. About how many acres of land were included in this fence that you built as you described enclosing the thirty acres in controversy?

A. Why I couldn't tell you.

Q. About how many, Jimmy, was there more than this thirty acres?

A. Yes.

Q. About how much more land?

A. Twenty or thirty or something.

Q. Did you file on that land?

A. I filed on that land.

Cross-examination.

By KENNETH S. MURCHISON:

Q. When did you take them fences down?

A. Never have taken them down, and they are now or part of them are there.

Q. Do these certificates that you have introduced in evidence embrace all the lands covered by that fence?

A. No.

Q. But you said you filed on the land; what became of it if it wasn't embraced in that?

A. Well, I lost part of it in contest.

Q. To whom?

A. Keeler.

Q. Didn't you get one ten acres right near the piece from Keeler?

A. No, sir.

Q. To allot on?

A. No, sir.

Q. Now when you put this fence around there that you have described was that before or after, or when was it with regard to the time that Mr. Ross and Mr. Duncan and Mr. Morris were there on the land?

A. Why you mean after it was there?

Q. When did you fence it. Was it before or after they were there? I asked you when you put this fence there, what time was that with regard to the time when these other people were there?

A. Why I had my fence up first, before any body had a fence there.

Q. Did you see Dr. Ross and these other people when they were there?

A. Yes I seen some people. I didn't see Ross. I seen the young Ross and I asked him who he was running this line for. He said it was a man up town. I asked his name and he said he didn't know. I told him this was my land.

Q. Where was that?

A. Down there on that ten acres.

Q. On the ten acres?

A. Yes, that they were running.

Q. What were they doing then at the time you were talking to them, and they wanted the ten acres?

A. They were going through on the south line.

Q. Did you see them put the posts there?

A. No, sir, I never seen any posts there.

Q. Now as a matter of fact when you put this fence around there, wasn't it the next day after you saw Dr. Ross and these other people on this ten acres?

A. I think it was the next day when I put the fence there.

Q. Well were there any posts there when you put the fence around?

85 A. No, there were no posts there.

Q. None whatever?

A. We seen some posts stuck up around but that was no fence. There were no posts just poles and nothing to go around it and the posts in the corners. That was all there was to it.

Q. Were there any other improvements on that land at the time you were there to put up a fence around, except those posts that you saw?

A. No, sir.

Q. None at all?

A. No.

By Mr. MURCHISON: That will do.

Redirect examination.

By Mr. VEASEY:

Q. Mr. Day, you spoke of losing some land in contest to Keelers. Now as a matter of fact wasn't the land which you lost to him a part of this enclosure that you made as was covered by this old field of the Keelers?

A. Yes.

Q. Mr. Day, who helped you build that fence around there as described?

A. Why, Clarence Day and Willie Perry.

Recross-examination.

By Mr. MURCHISON:

Q. Have you ever been arrested Mr. Day?
A. Yes, sir.
Q. How long ago?
A. Why I couldn't tell you.
Q. Within how many years, for what? Well I will ask you that after awhile.
By REFEREE: I ask how long ago you were arrested?
By Mr. VEASEY: Answer, Jim, if you know.
A. Why I have been arrested several times.
Q. Have you been arrested since you filed on this land for anything?
A. Why for disturbing the peace, I have.
Q. For disturbing the peace?
A. Yes, sir.
Q. Are you under bond now to the Court?
A. No, sir.

COUNSEL FOR PLAINTIFF: That is all.
COUNSEL FOR DEFENDANT: That is all.

Witness dismissed.

Defendant offers CLARENCE DAY as witness who after being duly sworn testified as follows:

86 Direct examination.

By JAMES A. VEASEY:

Q. State your name.
A. Clarence Day.
Q. How old are you, Clarence?
A. Twenty-seven.
Q. Where do you live?
A. I live four miles east.
Q. Are you related to James Day?
A. Yes, sir, he is my father.
Q. Clarence, you know where this land is that is in controversy?
A. Yes, sir.
Q. How long has your father claimed that land?
A. He has claimed it ever since I can remember.
Q. Did you ever help his cut——

Plaintiff objects to question and answer as they do not make the time or fact that this defendant has claimed that land, and is not material or relavent to the issue.
Objection overruled. Exception.

Q. Did you ever help your father cut any timber on this land, Clarence?
A. Yes, sir.

Q. How long ago?
A. It has been about seven years ago.
Q. Did you cut timber right along on it?
A. Yes, sir.
Q. Now do you know anything about the fencing of this land, by your father in the month of March, 1904?
A. Yes, sir.
Q. Did you help him do that fencing?
A. Yes, sir.
Q. What day of the month was it?
A. Why we commenced on the first day of March.
Q. About what time in the day?
A. About ten o'clock.
Q. When did you finish the fence?
A. We finished on the 2nd along about two o'clock.
Q. Is the land that is in controversy in this case in one tract or two?
A. It is in two.
Q. Of what size are those two tracts?
A. One of them is ten acres and the other is twenty.
Q. Which of the two tracts is north of the other?
A. The twenty is on the north.
Q. How much distance is there between the two?
A. Why, I suppose about ten.
Q. About a ten acre tract?
A. Yes.
Q. Where did you start to do the fencing that you did around this land?
A. We started on the northwest corner?
Q. Where was that with reference to the place that Bixler occupied, the old Johnstone-Keeler place?
A. That was east.
Q. How far east? I mean where from this ten? How far east of the Johnstone farm was it you started fencing?
A. About—Oh, it is about two hundred yards.
Q. Then which way did you go?
A. We went east.
Q. How far?
A. About a quarter.
Q. Then which way?
A. We went south, also a little east, not very much.
Q. To what point?
A. To the bridge.
Q. Then which way did you go?
A. We went back southwest.
Q. About how far?
A. About, a quarter, I guess.
Q. Then which way did you go?
A. We went north.
Q. You say you went southwest from the bridge, Clarence?

A. Yes.
87 Q. About a quarter?
A. Yes.
Q. Then which way did you go? you say you went north?
A. Yes.
Q. Did you go due north?
A. Nearly north, I would know the rock.
Q. You went north and back to where you started from. Now in going north as you described, did you run next a fence.
A. Yes, sir, we run right along the side of a fence.
Q. What fence was that?
A. Keeler's fence.
Q. How many wires were there in this fence?
A. Two.
Q. About how far apart were the posts that you used?
A. About twenty feet, something like that.
Q. What kind of posts were they, split posts?
A. Split posts.
Q. Now after you had finished this fencing and the enclosing both the twenty acres tract and the ten acre tract——
A. Yes, along here with other lands.
Q. With other lands, did your father put any further improvements on the land after he did this fence?
A. Yes, sir.
Q. What was the character of the improvements?
A. He build a house there.
Q. What kind of a house was it?
A. A box house.
Q. How many rooms?
A. Two down stairs and one up stairs.
Q. Did your father and his family move into the house after that?
A. Yes, sir.

Cross-examination.

By KENNETH S. MURCHISON:

Q. You say you commenced about two hundred yards from Keeler's farm?
A. Yes.
Q. And went east about a quarter of a mile?
A. Yes.
Q. Now did you cross the river?
A. No, sir.
Q. Did you see any posts around either the twenty or the ten?
A. No, sir.
Q. Did you see any posts put on any corners of either piece?
A. No, sir.
Q. You didn't see anything at all then?
A. Well, I seen some stobs, I wouldn't call them posts.
Q. What do you mean by stobs?

A. Stakes drove into the ground.
Q. You did see some stakes.
A. I did not see no stakes.
Q. I thought you said a stob was a stake in the ground?
A. We call it stob for a small stake.
By REFEREE: Is that what we call a stake?
Q. You did see something there that somebody had put there? Did that look like they had grown there?
A. No, sir. They looked as though they were set there down in the ground.
Q. And when you went there to put this fence around, were there any other improvements of any kind on the land?
A. No, sir.
Q. Nothing but those stobs you have described?
A. Yes sir, that is all.
Q. Were these stobs long enough for a man to stumble over them?
A. I suppose he would kind of stumble over them.
Q. You didn't stumble over them, did you.
A. No, sir.
Q. You saw them and other marks?
A. Yes, sir.

COUNSEL FOR DEFENDANT: That will do.
COUNSEL FOR PLAINTIFF: That will do.

88 Witness dismissed.

Defendant offers WALLACE BUFORD as witness, who being duly sworn testified as follows:

Direct examination.

By JAMES A. VEASEY:

Q. State your name.
A. Wallace Buford, Bartlesville, Oklahoma.
Q. How old are you Mr. Buford?
A. Forty-eight years old the 28th of November about.
Q. Are you acquainted with James Day, Mr. Buford?
A. Yes, sir.
Q. Do you know where the land is that is in litigation between him and Robert B. Ross and Fannie D. Ross?
A. That is the twenty or the thirty?
Q. It is a twenty and a ten.
A. I know it.
Q. How long have you known that land.
A. Ten or twelve years.
Q. How long?
A. Ten or twelve years.
Q. How far do you live from that land during the time you have known it?
A. I have lived right by it about eight years.
Q. During the time that you have lived in the neighborhood of

that land, Mr. Buford, who has asserted a claim for it all the time?
A. Jimmy Day.

Plaintiff objects. Objection overruled. Exception.

Q. Did you ever see Jim Day or his son Clarence using any land for cutting timber or posts of that sort?
A. I seen Clarence and Jim both making posts there. They helped fix my fence by making posts there.

Plaintiff objects to that question and answer as being thoroughly irrelevant, and immaterial as proving nothing of the issues in this controversy. Objection overruled. Exception.

By Mr. BUFORD:

A. Well that is about all I know about it, that James Day has always claimed the land. I know that he stopped other people from cutting timber off it for several years people used to burn wood before we got gas, and he would make them get off out from cutting the timber, and he helped me keep the south line of my fence, which is the north line of his twenty acres. He has helped me to fix that fence, and he has fixed up my fence on the east side of the river himself. I put the fence there and he has kept it in shape.

Plaintiff objects. Over-ruled. Exception.

Q. Do I understand that that was considered sort of a division fence between your place and that twenty acres?
A. It was the south line fence. He helped to maintain it.
Q. That was the north line of this north twenty acres?
A. Yes.
Q. Mr. Buford, when did you first see a wire fence completely around that little tract of land in the bottom including this thirty acres in controversy? When did you first see that fence there?
A. I saw a fence there,—well it has been quite a while, I cannot remember the exact date, but I think the first of March, 1904, it might have been in February.

89 Cross-examination.

By KENNETH S. MURCHISON:

Q. The north line of the twenty acres you described is on the section line, isn't it Mr. Buford?
A. Yes, sir.
Q. Then there is a public road there isn't there?
A. No, sir.
Q. Well, the law makes it a public road?

Objected to for the reason that it calls for a conclusion of law, and not a statement of fact.
Objection sustained. Exception.

Q. Did you fence on the south side and was that on the line of his twenty acres?
A. Yes, it was on the north line of the twenty acres.
Q. It wouldn't leave any public road at all?

A. No, sir, it has been there,—the fence has been there for several years before the allotment.
Q. Well now if you had a fence on the north line of this twenty acres can you explain why Mr. Day has testified that he put a fence there the first of March, 1904. Did he take your fence down?
A. No, sir.
Q. Are you related in any way to Mr. Day, Mr. Buford?
A. No, sir.
Q. By marriage or otherwise?
A. No, sir.
Q. Are you related to Mrs. Day by marriage?
A. No, sir.
Q. Do you know whether or not Mr. Day has made a lease on this land.

Objected to for the reason that it is irrevelent, immaterial and incompetent. Objection over-ruled. Exception.

A. I never saw the lease. I seen the land had certainly been leased for there were some wells on it.
Q. Do you know who put those wells there?
A. This gentlemen here and I believe a Mr. Harned.
Q. What is this gentlemen's name?
A. Mr. Lamon.
Q. And Mr. Harned?
A. Yes, sir.
Q. Are you interedted with him in any oil leases?
A. No, sir. We have always been scrapping.
Q. Did you see Mr. Day when he put this fencing around there that you described?
A. No, sir, I didn't see him put it there.
Q. Then you do not know kust exactly when it was put in there?
A. No, not exactly the time it was put there.

Counsel for Defendent: That is all.
Counsel for Plaintiff: That is all.

Witness dismissed.

Defendant offers as witness L. D. HARNED, who being duly sworn testified as follows:

Direct examination.

By JAMES A. VEASEY:

Q. State your name.
A. L. D. Harned.
Q. How old are you.
A. I was fifty-four years old yesterday, on the 23rd day of September.
Q. Where do you live Mr. Harned?
A. Bartlesville, Oklahoma.
Q. Do you know James Day?
A. Yes, sir.

Q. How long have you known James Day?
A. About five years, or over—five years.
Q. Do you know where the land that is in litigation between him and Robert B. Ross and Fannie D. Ross is?
90 A. Yes, sir.
Q. Do you know anything about this land during the month of March, 1904?
A. Yes, sir.
Q. Just go on and state in your own way what you know about it?
A. On the first day of March, 1904, Mr. Day come to town, come here to Bartlesville, and he said there was some party jumping his land. He wanted me to get some wire for him and help him fence the land. We went and bought the wire—a load or wire,—went down to his farm, went over across the river with the load and there were six or eight or ten men, there was quite a body of them, over there fencing and he divided his forces by sending his son, a young man by the name of Willie Perry west of the river to fence, and sent me up to get some white men with teams, two different sets of white men with teams. I went and got those men and put them on this fencing on the east side.
Q. Now at what time was it that you first saw either James Day and his boys doing this fencing?
A. Although the chances is that they were working on the fence that they had put up on this land, I saw it on the morning of the second of March.
Q. Where were they fencing at that time? Mr. Harned?
A. They were pretty well along, they were down on the south ten then toward the center of the section.
Q. Were they then fencing on the east line of this property or the south line?
A. On the south line, had finished the east line.
Q. And the north line?
A. Yes, sir. I first saw the fence on the north line.
Q. When did you see that?
A. That morning perhaps eight or nine o'clock.
Q. Of the 2nd of March?
A. Yes, sir.
Q. What was the character of that fence, Mr. Harned, with regard to the number of wires?
A. It was a two wire fence.
Q. About how far apart were the posts?
A. They used posts and they used trees. Wherever there was a tree they would nail ti it and whereevr there was—it was pretty thick timber through there, and wherever there was a tree convenient they would nail to it, and they would fill in posts.
Q. What kind of posts were they?
A. They were split posts.
Q. Do you have any knowledge of James Day's putting further improvements on that land, after building the fence?
A. Yes, sir.
Q. What was the character of that improvements.

A. It was a three room box house.

Q. Do you know, approximately, the cost of that house, Mr. Harned?

A. About $250.00.

No Cross Examination.

COUNSEL FOR PLAINTIFF: That will do.

COUNSEL FOR DEFENDANT: That will do,

Witness dismissed.

By Mr. VEASEY: We desire to offer in evidence Section 760 of the laws of the Cherokee Nation, the compiled Edition of 1892 as the same appears at Page 376 of said compilation reading as follows:

Counsel for plaintiff objects to the evidence of law inasmuch as it is immaterial and irrevelent, the official survey of the improvements in this section which is already in evidence shows that the
91 land- in controversy are within the quarter mile limit referred to, and further for the reason that the statutes of the United States provide for allotment of lands, recognizing only actual improvements and no usufructuary interests of citizens of the Cherokee Nation.

Objection over-ruled. Exception.

"No person shall be permitted to settle or erect any improvements or cut and remove timber within one-fourth of a mile of the house, field, or other improvement of another citizen without his, her, or their consent, under the penalty of forfeiting such improvement and labor for the benefit of the original settler."

and we also offer in evidence Section 761 of said laws at same page:

"All improvements which may be left unoccupied by any person or persons, citizens of this nation, and such other person or persons removed to another place leaving no person or tenant on their former place for the term of two years such place or improvement shall be considered abandoned and revert to the Nation as one property, and any person or persons whatever, citizens of this N-tion may take possession of any such improvement so left which shall thence forward be considered their lawful property."

and we will amend our answer to include these provisions of the law.

Defendant rests.

It is stipulated that defendant may amend his answer as *as* to include section 761 of the Laws of Oklahoma in his pleading.

Plaintiff now recalls Mrs. LUCINDA HILL in rebuttal.

Direct examination.

By KENNETH S. MURCHISON:

Q. Mrs. Hill, you testified in this case yesterday in chief did you not.

A. Yes, sir.
Q. That was the 23rd day of September?
A. Yes, sir.
Q. Now in your direct testimony you told about Dr. Ross, Mr. Duncan and another gentlemen being there about the first day of March, on the first day of March doing some surveying and setting some posts?
A. Yes, sir.
Q. You yourself saw one post, if I recall.
A. That was all.
Q. One corner?
A. Yes, sir.
Q. Now when after that did Mr. Day come on that land to fence it?
A. The next morning after Mr. Ross and those men were there, Clarence Day, Jimmy Day and Willie Perry, between daylight and sun up they came around. It was just as I was getting breakfast.
Q. It was between day light and sun up you saw them?
A. Yes, sir, the three.
Q. Do you know when they first crossed the river?
A. No, I don't know anything about that. They come across the bridge that afternoon after Dr. Ross and the people left. As I recollect the time they crossed the bridge they was going toward home.
Q. Going towards home?
A. Yes, sir.
Q. If there any other way of crossing the river at all near the bridge?
A. Yes, sir, there is a ford right below the bridge.
Q. Then between daylight and sun up, you saw them on that side of the river?
A. I saw the three right along there.
92 Q. What were they doing?
A. They were tacking up wire.
Q. From what direction did they come?
A. They was coming from the direction toward the house.
Q. Are you sure that that was the day after Dr. Ross and those gentlemen were there?
A. Yes, sir, I am sure it was the day after. The reason I am sure, we was speaking something about it, and it was the day after.

Cross-examination.

By JAMES A. VRASEY:

Q. Mrs. Hill, I think you say that you know that these two tracts of land are separated by some distance—these that are in litigation?
A. No.
Q. How much land do you think is in litigation in this case?
A. There is thrity acres.
Q. Now is your understanding that it is all together in one tract?

A. Well there is ten here and twenty over there.
Q. How much distance is there between these two tracts?
A. Well, they are together in one piece.
Q. Well, isn't there some land between the twenty acres and the ten acres?
A. Not that I know of.
Q. Your idea is that the twenty acres is,—that the twenty and ten acres join?
A. Yes, sir, they do, but they do not lay side by side, I do not think.
Q. The point I am trying to find is that the ten is in a ten acre square and the twenty acres is some distance north of it?
A. Yes, it is north of it.
Q. How far north is this ten acre square? About how far did you say it is?
A. The ten acres or the twenty acres? They join don't they?
Q. That is your knowledge of it, isn't it?
A. Yes, sir, that is my knowledge.
Q. Is your house right near the ten acres?
A. Ten ten acres and the twenty acre tract both lie here, but the ten is nearest the house, sir.
Q. Which way from your house is the ten acre tract?
A. It is west.
Q. It is west?
A. Yes, about due west.
Q. Which way from your house is the twenty acre tract?
A. It is north.
Q. It is north?
A. Well, I should think it was.
Q. Now what if I should tell you that there is a half mile or a quarter of a mile between the ten acres and the twenty acre tract, would that correspond with your understanding of it?
A. No that wouldn't correspond with my understanding. My understanding is that they were close together. I saw them surveyed.
Q. Now how far east of the ten acre tract, as you have expressed it, is your house? How many yards or feet?
A. Well, I couldn't tell you exactly, for I do not know. I never measured it.
Q. I know, but about how many yards? There is not more than one hundred yards you say to the ten acres? From the ten acres to your house?
A. There is about two hundred yards I should say.
Q. Now, how far have you always thought it was from your house to where the twenty acres was?
A. Well, it ain't more than, so my understanding is the way they said they surveyed it, it aint more than one hundred yards from our step.
Q. As a matter of fact, it is your understanding that the ten acres is nearer your house than the twenty acres?
A. Yes, sir.

Q. Now, if as a matter of fact there is a quarter of a mile between the ten acre tract and the twenty acre tract then you do not know anything about the twenty acre tract, do you? Observe that carefully, I am asking you if it is true, as I say it is, that there is a quarter of a mile between the South ten, which you deny it is, and the North twenty, then you have had in mind a different twenty acres, have you not?

A. No, I cross right over it every time I come to town.

Q. Now, Mrs. Hill, you have said that the twenty acres is within one hundred yards of your house, haven't you?

A. Yes, sir, I did.

Q. Now, if the record says that the twenty acres is a quarter of a mile from the ten acres, one of the two is wrong, is it not? Either you are wrong, or the record is wrong, is it not? Isn't that true?

By REFEREE: Do you understand, Mrs. Hill?

Q. Now if the record shows that the twenty acres which is in controversy, is a quarter of a mile from the ten acres in controversy, you have in mind a different twenty acres of land, have you not?

A. Why, if that is so I have.

Q If what I say is true, then you have in mind a different tract of land?

A. Yes, sir.

Q. Now, Mrs. Hill, you do not know anything about this twenty acre tract of land which is a quarter of a mile from the ten acre tract of land, do you?

A. No.

Q. You do not know whether any fencing was done on that twenty acre tract of land on the first day of March, 1904 by James Day do you?

A. No, I do not at that time.

COUNSEL FOR DEFENDENT: That will do.
COUNSEL FOR PLAINTIFF: That will do.
Witness dismissed.
Case closed.

94 (PLAINTIFF'S EXHIBIT No. 1.)

Department of the Interior, Commissioner to the Five Civilized Tribes.

Cherokee Roll, Citizens by Blood.

No. 16354; Name, Ross, Robert B.; Age, Fifty Seven, Sex, Male, Blood ½; Census Card No. 6838.

No. 16355; Name, Ross, Fannie D.; Age, Fifty Four, Sex, F., Blood ¼; Census Card No. 6838.

This is to certify that I am the officer having custody of the approved roll of Citizens by blood of the Cherokee Nation, and that the above and foregoing is a true and correct copy of that portion

of said roll appearing at numbers 16354 and 16355. Enrolled as of September 1, 1902. P. O. Tahlequah, Okla.

Jn. Rosson, Clerk.

Muskogee, Oklahoma, September 22, 1908.

J. GEORGE WRIGHT,
Commissioner to the Five Civilized Tribes,
By W. S. D. MOORE, *Clerk.*

(PLAINTIFF'S EXHIBIT No. 2.)

Department of the Interior, Commissioner to the Five Civilized Tribes.

Cherokee Allotment Contest No. 1181.

ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee.

With Which is Consolidated Cherokee Allotment Contest No. 1182.

FANNIE D. ROSS, by Her Husband, ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee.

Notice.

To Robert B. Ross, the above-named contestant, or William P. Thompson, his attorney of record; to Fannie D. Ross, the above-named contestan, or Robert B. Ross, her husband, or William P. Thompson, her attorney of record; to James Day, the above-named contestee, or Veasey and Rowland, his attorneys of record:

You are hereby notified that on the 6 day of June, 1906, the Commissioner to the Five Civilized Tribes rendered his decision in the above entitled and numbered consolidated cause, awarding the land in controversy, to-wit, the NW4 of the NE4 of the NW4 and the SE4 o- the SE4 of the NW4 of Section 19, Township 26 North, Range 13, East of the Indian Meridian, containing 20 acres, and being the land in controversy in Cherokee Allotment Contest No. 1181, to Robert B. Ross; and the NE4 of the NE4 of the NW4 of Section 19, Township 26, North, Range 13, East of the Indian Meridian, containing 10 acres, and being the land in controversy in Cherokee Allotment Contest No. 1182, to Fannie D. Ross; that a copy of said decision is hereto attached; and that thirty days from the date hereof are allowed the contestee within which to appeal from said judgment of the Commissioner to the Five Civilized Tribes to the Commissioner of Indian Affairs, and to serve copies of the appeal on the opposite parties.

Dates at Muskogee, Indian Territory, this 6 day of June, 1906.

TAMS BIXBY,
Dis. Commissioner.

W. E. A.

95 Department of the Interior, Commissioner to the Five Civilized Tribes.

Cherokee Allotment Contest No. 1181.

ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee.

Land in controversy: The NW/4 of NE/4 of NW/4, and SE/4 of SE/4 of NW/4 of Section 19, Township 26 North, Range 13 East, of the Indian Meridian, Containing 20 Acres.

With Which is Consolidated Cherokee Allotment Contest No. 1182.

FANNIE D. ROSS, by Her Husband, ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee.

Land in controversy: The NE/4 of NE/4 of NW/4 of Section 19, Township 26 North, Range 13 East, of the Indian Meridian, Containing 10 Acres.

Appearances: For contestant, in Contest No. 1181, in person. For contestant, in Contest No. 1182, Robert B. Ross, her husband, and Wm. P. Thompson, atty. For Contestee, in person and by Veasey & Rowland, Att'ys.

Findings and Decision.

After an investigation of the records in the possession of this office and due consideration of the pleadings and evidence in this case, it appears as follows:

Statement of Records.

That James Day is a registered Delaware; that Robert B. Ross and Fannie D. Ross are citizens by blood of the Cherokee Nation; and that each is entitled to an allotment of lands of said Nation.

That on May 5, 1904, James Day appeared at the Cherokee Land Office and made application for the land in controversy in Cherokee Allotment Contest No. 1181 for himself and the same was, by the Commission to the Five Civilized Tribes, set apart to the said James Day as a portion of his allotment selection.

That on July 1, 1904, Robert B. Ross appeared at the Cherokee Land Office and made application to have the land in controversy in said Contest No. 1181 set apart to himself as a portion of his allotment, and the same having been theretofore selected as herein stated the said Robert B. Ross was so notified by the Commission and his application for said lands was therefore refused.

That on July 1, 1904, Robert B. Ross, contestant in said Contest No. 1181, filed therein his complaint, duly verified.

That on September 26, 1904, the cause was set for trial on November 9, 1904, at nine o'clock A. M. and notice of contest and summons issued to contestee.

That on October 11, 1904, return of notice of contest and summons was filed, showing service on James Day, the contestee on October 10, 1904.

That on November 9, 1904, this cause was called for trial. Both parties appeared in person and by counsel and said cause was, by agreement, continued to November 28, 1904, at nine o'clock A. M.

96 That on November 28, 1904, this cause was called for trial. Contestant appeared in person and by counsel. Contestee failed to appear; whereupon a hearing was had in part and at five o'clock P. M., the same was adjourned to November 29, 1904 at 9 o'clock A. M.

That on November 29, 1904, this cause was called for further hearing pursuant to adjournment. Contestant appeared in person and by counsel and contestee failed to appear; whereupon the hearing was resumed and concluded and this cause taken under advis-ment by the Commission.

That on November 29, 1904, on motion of the Commission, Cherokee Allotment Con-est No. 1182 was consolidated herewith.

That on January 3, 1906, contestee filed motion to reopen this cause, showing service thereof by registered letter addressed to W. P. Thompson, attorney of record for the contestant, on December, 1904.

That on June, 19, 1905, contestee's motion to reopen this cause was allowed by the Commission.

That on June 23, 1905, notice that Contestee's motion to reopen this cause had been allowed, and that the cause would be set for hearing at some date thereafter to be fixed by the Commission, was sent by registered letter to the attorneys of record for both parties.

That on October 25, 1905, this cause was set for trial on November 29, 1905, at nine O'clock A. M., and notice thereof sent by registered letter to the attorneys of record for both parties.

That on November 29, 1905, this cause was called for trial. The Contestant appeared by W. P. Thompson, his attorney of record, and contestee appeared by James Veasey, his attorney of record, and by agreement this cause was continued to January 11, 1906, at nine o'clock A. M.

That on January 11, 1906, this cause, not being reached on the day's call, was continued to January 12, 1906, at nine o'clock A. M.

That on January 12, 1906, this cause was called for trial. Contestant appeared in person and by W. P. Thompson, his attorney of record. Contestee appeared in person and by Veasey and Rowland, his attorneys of record. Both parties announced ready for trial, whereupon a hearing was had and the cause taken under advis-ment by the Commissioner.

That on May 5, 1904, James Day appeared at the Cherokee Land Office and made application for the land in controversy in Cherokee

Allotment Contest No. 1182 for himself, and the same was by the Commission to the Five Civilized Tribes set apart to him as a portion of his allotment selection.

That on July 1, 1904, Robert B. Ross appeared at the Cherokee Land Office and made application to have the land in controversy in said contest No. 1182, set apart to Fannie D. Ross as a portion of her allotment, and the same having been theretofore selected as herein stated the said Robert B. Ross was so notified by the Commission and his application for said land was therefore refused.

That on July 1, 1904, Fannie B. Ross by her husband, filed in said contest No. 1182 her complaint, duly verified.

That on September 26, 1904, this cause was set for trial on November 9, 1904, at nine o'clock A. M. and notice of contest and summons issued to contestee.

That on October 11, 1904, return of notice of contest and summons filed showing service on James Day, the contestee, on October 10, 1904.

97 That on November 9, 1904, this cause was called for trial, and both parties being present by counsel, this cause, by agreement, was continued to November 28, 1904, at nine o'clock A. M.

That on November 28, 1904, this cause not being reached on the day's call was continued to November 29, 1904, at nine o'clock A. M.

That on November 29, 1904, this cause was called for trial. Contestant appeared by Robert B. Ross, her husband, and by counsel, and contestee failed to appear. Contestant submitted as her evidence in this cause, the evidence submitted in Cherokee Allotment Contest No. 1181, and on motion of the Commission this cause was consolidated with Cherokee Allotment Contest No. 1181.

Findings of Fact and Conclusion.

It is contended on behalf of contestants that their title to the land in controversy was acquired from one George Keeler by purchase on November 1, 1902, and also that subsequent to that time, they further improved the land in controversy by placing a row of stakes around the same, and taking possession thereof.

The contestee claims that he has been in possession of the land in controversy for the past ten or fifteen years, and has cut timber therefrom, and claimed the right to hold all of said land long before the contestants acquired any right therein, and that he is also the owner of a fence which entirely incloses the same.

Contestee also objected to the testimony of contestant's witnesses, C. M. Ross and A. E. Beard; the objection to Ross' testimony being founded upon the fact that the rule excluding witnesses from the room had been invoked by the contestee, and that witness Ross had been present throughout the hearing. The objection to the witness Beard was founded upon his admission that he had been convicted and served a term in the penitentiary for forgery.

Section 2906 of Mansfield's Digest Provides as follows: "If either

party requires it, the judge may exclude from the court room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witnesses."

From the language used in the section just quoted, which forms the basis of the objection to the testimony of C. M. Ross, it will be observed that the matter of excluding a witness from the room is entirely discretionary with the Court, and while it is true that the rule was invoked in this case, and that witness C. M. Ross should properly have been excluded from the room, in view of the fact that this witness had testified at a former hearing of the case when the contestee did not appear and that the contestant did not at that time of this trial apprehend the necessity of placing this witness again upon the stand, the Commissioner is of the opinion that the objection of the contestee to the testimony of witness C. M. Ross should be overruled.

The objection to the witness Beard is founded upon a portion of Section 2859 of Mansfield's Digest, and from the language used in said section, it is very clear that the witness Beard is not a competent person to testify, and his testimony will not, therefore, be considered in passing upon the merits of this controversy.

The evidence shows that the land in controversy was formerly a portion of the holdings of Johnstone and Keeler, and that
98 when Johnstone and Keeler dissolved partnership, the land in controversy was a portion of the land that fell to Keeler in the division of their said holdings.

It is further in evidence that on November 1, 1902, Keeler executed a bill of sale, conveying his interest in the land in controversy to Robert R. Ross, the contestant in Contest No. 1181, and the husband of contestant in Contest No. 1182. However it is shown by the evidence that the only improvements owned by Keeler on any portion of the land in controversy consisted on one and forty-five one-hundredths (1.45) acres of cultivated land, inclosed, and located in the southwest corner of the northwest quarter of the north-east quarter of the Northwest quarter of Section 26, Township 19, north Range 26 East of the Indian Meridian, which is a portion of the land involved in Contest No. 1181.

It further appears that on or about March 1, 1904, the contestants authorized their son to inclose all of the land in controversy and take possession of the same for them, and that under said authority, their son proceeded to survey the lines of the land in controversy and placed a row of stakes entirely inclosing the same.

When the contestee observed this action on the part of the contestants, looking toward the segregation of the land in controversy, he proceeded to purchase wire, and immediately after the contestants had inclosed said land with posts, erected a fence entirely inclosing the controverted land, together with other land adjacent thereto, except the small tract of cultivated land hereinbefore mentioned, which was a portion of the Keeler improvements.

After carefully considering all of the evidence in this case, the Commissioner is of the opinion that the contestants were the first, in point of time, to take possession of the land in controversy for

the purpose of segregating the same from the public domain, and that the improvements placed by the contestants upon said land, together with the improvements they acquired from Keeler, were sufficient to give contestee ample notice that the contestants were holding the same for the purpose of taking same in allotment, before contestee inclosed same with his fence, or filed thereon, and the contestants should, therefore, be awarded the land in controversy.

Judgment.

It is, therefore, ordered, adjudged that the Northwest quarter of the northeast quarter of the northwest quarter, and the southeast quarter of the southeast quarter of the northwest quarter of section 19, township 26 north, range 13 east of the Indian Meridian, containing twenty (20) acres and being the land in controversy in Cherokee Allotment Contest No. 1181, be awarded to Robert B. Ross, the contestant therein; that the northeast quarter of the northeast quarter of the northwest quarter of section 19, township 26 north, range 13 east of the Indian Meridian, containing ten (10) acres, and being land in controversy in Cherokee Allotment Contest No. 1182, be awarded to Fannie D. Ross, the contestant therein; and that the records of the Cherokee Land Office be made to conform in all things to this decision.

TAMS BIXBY,
Commissioner to the Five Civilized Tribes.

Dated this 6 day of June, 1906.

99 PLAINTIFF'S EXHIBIT No. 3.

Department of the Interior, Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

Cherokee Allotment Contest No. 1181.

ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee.

With Which is Consolidated Cherokee Allotment Contest No. 1182.

FANNIE D. ROSS, by Her Husband, ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee.

Notice.

To Robert B. Ross, the above-named contestant, or William P. Thompson, his attorney of record; to Fannie D. Ross the above-named contestant or Robert B. Ross her husband, or William P. Thompson her attorney of record, and to James Day, the above-named contestee, or Veasey and Rowland, his attorneys of record:

You are hereby notified that on the 6th day of March 1907 the Commissioner of Indian Affairs rendered his decision in the above

entitled and numbered consolidated cause affirming the decision of the Commissioner to the Five Civilized Tribes theretofore rendered awarding the land in controversy to the respective contestants, that a copy of said decision is hereto attached and thirty days from the date of this notice are allowed the contestee James Day within which to appeal from said decision to the Secretary of the Interior and serve a copy of said appeal on the opposite parties.

Dated at Muskogee, Indian Territory this 16th day of March, 1907.

TAMS BIXBY,
F. H. R.,
Commissioner

Refer in reply to the following: Land. 67767—1906. 102155—1906. 13587—1907.

DEPARTMENT OF THE INTERIOR, G. A. W.
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *March* 6, 1907.

Cherokee Allotment Contest No. 1181.

ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee.

Land in controversy. The northwest quarter of northeast quarter of the northwest quarter and the southeast quarter of the southeast quarter of the northwest quarter, section nineteen, township twenty-six north, range thirteen east, of the Indian meridian, containing twenty (20) acres.

100 With Which is Consolidated Cherokee Allotment Contest No. 1182.

FANNIE D. ROSS, by Her Husband, ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee.

Land in Controversy: The northeast quarter of the northeast quarter of the northwest quarter, section nineteen, township twenty-six north, range thirteen east, of the Indian meridian, containing ten (10) acres.

Commission-r to the Five Civilized Tribes, Muskogee, I. T.

SIR: This office is in receipt of your communication of August 3, 1906 transmitting the record on appeal by the contestee from your decision of June 6, 1906 in above entitled and numbered consolidated Cherokee allotment contest.

The records show that Robert B. Ross and Fannie D. Ross the contestants are citizens by blood of the Cherokee Nation, that James

Day the contestee is a registered Delaware and that all are entitled to allotments of the lands of the Cherokee Nation.

James Day appeared at the Cherokee Land office on May 5, 1904, and made application for the land involved in contest No. 1181, which the Commission set apart to him as a part of his allotment selection.

Robert B. Ross appeared at the Cherokee Land Office on July 1, 1904, and made application for the land involved in contest No. 1181 as a part of his allotment selection, but the commission refused his application notifying him that the land had been previously selected.

Robert B. Ross filed his duly verified complaint, on July 1, 1904, in which he says:

That he, Robert B. Ross is 58 years of age and a citizen of the Cherokee Nation, That on the 1 day of July, 1904, he made application to the Commission to the Five Civilized Tribes at the Cherokee Land Office to take in allotment for himself, Robert B. Ross, the N. W. ¼ of N. E. /4 of N. W. /4 and S. E. /4 of S. E. /4 of N. W. /4 of Sec. 19 T. 26 N. R. 13 E. and it appeared of record that on the 5 day of May, 1904, the said tract of land was selected by James Day for himself, James Day.

The Contestant further states that said land has improvement thereon, consisting of fencing and a small portion in cultivation; that contestant is the owner of said lands and the improvements thereon; that contestant had owned said lands and improvements thereon for about two years last past; that contestee did not own said land at the time he filed thereon, and does not now own said lands.

Wherefore contestant prays that he be permitted to take in allotment the tract of land herein described.

Contest No. 1181 was heard on November 28 and 29, 1904, the contestant appearing in person and by counsel and the contestee, failing to appear. On November 29, 1904, on motion of the Commission, Cherokee allotment contest No. 1182 was consolidated with contest No. 1181 and the cause so consolidated was taken under advisement by the Commission.

On June 19, 1905, the Commission allowed a motion of the
101 contestee, filed January 3, 1905, to reopen the cause and, both parties appearing in person and by counsel, the cause was heard and taken under advisement by you on January 12, 1906.

On June 6, 1906 you rendered your decision, in favor of the contestants, and notice of the decision, and of the right of the contestee to appeal within thirty days from the date of notice was given by registered letter to the attorneys of record of the parties.

The contestee filed an appeal and argument on July 5, 1906.

The office is in receipt by Departmental reference of November 20, 1906 (I. T. D. 14203-1906) of a letter from Robert B. Ross requesting early decision of the contest because the land is being drained of oil by neighboring wells. On February 11, 1907 K. S. Murchison filed an affidavit of Charles M. Ross to this fact and

consequently this contest is taken up in advance of its chronological order.

The land in controversy is in two tracts, lying about two miles southeast of Bartlesville.

The Caney River runs southeast across the northeast corner of the north tract, which contains twenty acres, the other tract contains ten acres and lies west of the Caney River and a furlong south of the east half of the N/2 of the NE/4 of the NW/4 of the Section.

When the premises were selected in allotment by the contestee, on May 5, 1904 the improvements consisted of land in cultivation, of system of posts and certain fences. A substantial fence enclosed the cultivated land, covering an acres and a half at the southwest corner of the N/2 of the NE/4 of the NW/4 of the Section, together with land not in controversy, in the adjoining farm of Bixler, a non-citizen who used the little field rent-free and has always been ready, the records show, to surrender possession thereof to the contestant, at his request. A post was placed at each corner of the SE/4 of the SE/4 of the NW/4 of the Section, and other posts or stakes were placed along each line at a distance of about a hundred feet apart, except, that the first post on each line was only about eight feet from the corner and probably the second post was about the same distance from the first one.

The same general method somewhat modified by the situation of the land was employed in marking out the N/2 of the NE/4 of the NW/4 of the Section. The southeast corner was accurately located and marked, the east and south lines were then extended respectively north to the Caney River and west to the road skirting the fence around Bixler's field and marked. The west line was run north from Bixler's fence and the north line was run east to the Caney River. These lines were also marked with posts. The surveying and the setting of posts was done for the contestants. The other improvements were fences erected by the contestee.

(While the testimony is conflicting as to whether the posts of the contestants or the fences of the contestee were first put on the land in controversy, the weight of the evidence indicates that the improvements for the contestants were made first and your finding to that effect is not assigned as an error.)

The contestee alleged, in his motion for an appeal:

That the act of placing the several posts about the lands in controversy by the contestants as disclosed by the evidence was not sufficient segregation of the land in controversy, nor did the same confer the possessory right thereto upon said contestants.

This appeal, therefore, raises no other question than the
102 single issue of law as to whether the improvements of the contestants, as detailed, were sufficient to give preferential right to select the premises in allotment.

In Grissom vs. Asbury (Creek No. 16, I. T. D. 379-1900 Land 58418-1900), reported to Commissioner's report 1901-2 page 131 when it was shown that Grissom had placed in position only about fifty posts to build a fence "enough to designate the location of the

claim" most of which had been removed, the Department held that "the work done was the act of actual possession and warning to anyone of their claim." In this case the contestant was a minor.

In Dora M. Horn vs. Joe Queen (Cherokee No. 14 Land 38119-1904) it was held "that the placing of posts eighteen feet apart, for two hundred yards on the south side of the lands in controversy was a fair indication of possession and sufficient to put contestee upon inquiry as to whom said improvements then belonged. "The land was awarded to the Contestee, who was not a minor."

In John Moore vs. David McKinney (Choctaw No. 565, consolidated, Land 86485-1906) where the adopted father of the minor contestant blazed the trees around the land he wanted, wrote his name on them, set posts about twenty feet apart driven into the ground about eighteen inches deep, and made some rails on the land, it was held that there was sufficient improvement on this tract to put one on inquiry and the Commission's award to the minor contestant was affirmed.

There was no appeal from the decision of this office in either of the last two cases.

In order to avoid any misapprehension, it is proper to observe that the decision in favor of the contestants is reached on the theory that all the land in controversy was public domain when the disputed improvements were made. While there was evidence tending to show the small field of grain with it- substantial fence, was held by a tenant of the contestants, and while the string of fence erected by the contestee excluded this little field from the enclosures of the contestee, (it is not necessary to decide whether the improvements on the acre and a half were owned by the contestants or were part of the public domain.

The contestants are entitled to an award, conceding that the land was public domain, and their case does not need to be strength-ed by showing that they had possession or any preferential right to allotment except priority in establishing the system of posts.)

In view of the decision cited your decision in favor of the contestants is affirmed.

You are requested to notify the interested parties and advise them of the right of contestee to further appeal.

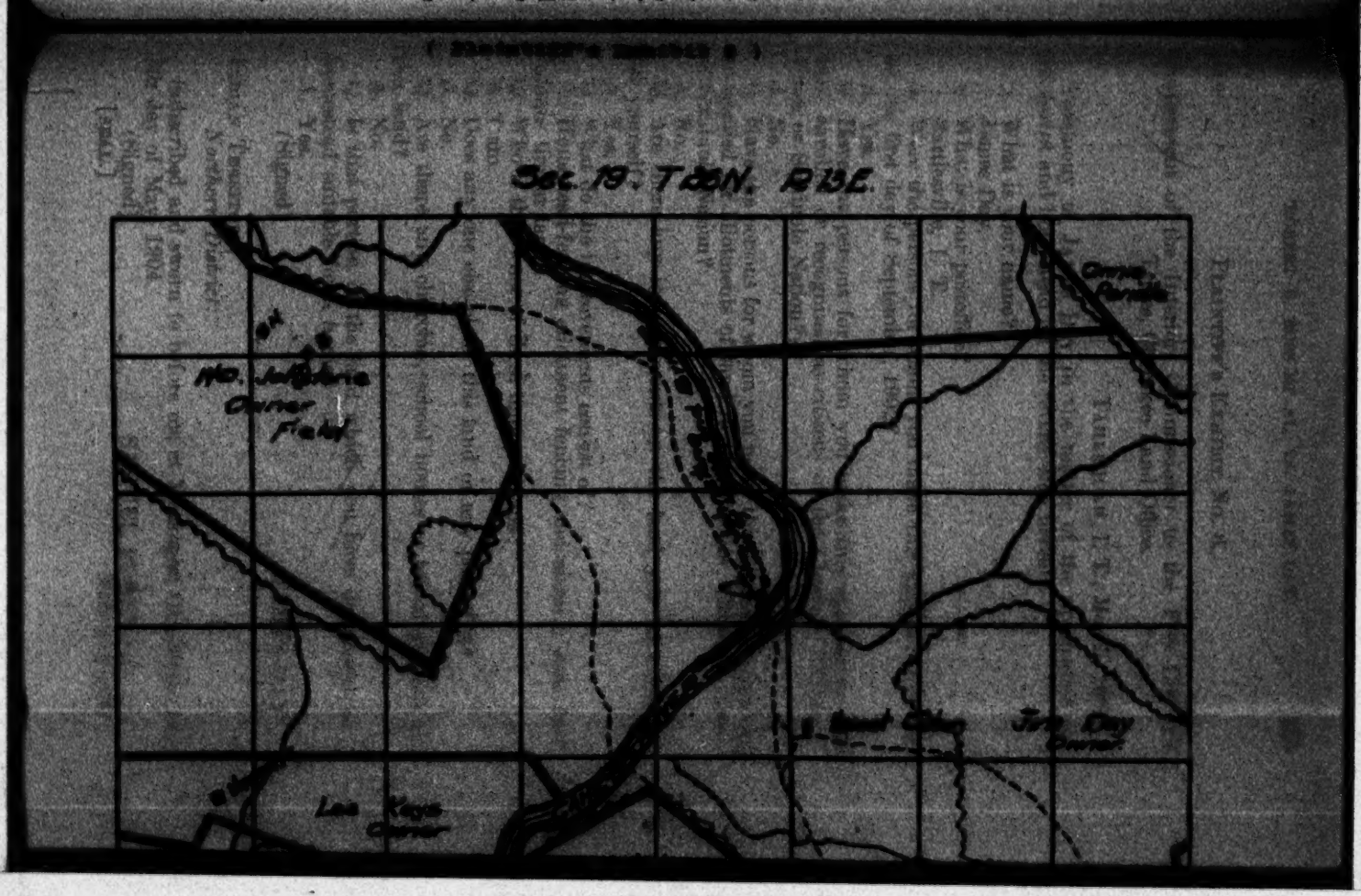
Very respectfully,

C. F. LARRABEE,
Acting Commissioner.

R. T. B.—M. B. B.

(Plaintiff's Exhibit No. 4 is identical with defendant's exhibit A. Supra page 98.)

(Here follows plat marked page 103.)


Sec. 19. T 20 N. R 13 E.
No. Jefferson Corner Field
Lee Keys Corner

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of traverse map of section 19, township 26 north, range 13 east, in the Cherokee Nation.

Signed

J. Geo. Wright,

Commissioner to the five civilized tribes.

By W.S.D.Moore.

Clerk

Muskogee, Okla.
Sept. 22, 1908.

90

104 PLAINTIFF'S EXHIBIT No. 6.

Department of the Interior, Commissioner to the Five Civilized Tribes, Cherokee Land Office.

TAHLEQUAH, I. T., *May* 5, 1904.

Testimony of JAMES DAY in the matter of the application for allotment and homestead on the reverse side hereof.

Q. What is your name?
A. James Day.
Q. What is your postoffice?
A. Bartlesville, I. T.
Q. Were the persons for whom you make this application living on the first day of September, 1902?
A. Yes.
Q. Have the persons for whom you make this application ever been enrolled or recognized as citizens of the Choctaw, Chickasaw, Creek or Seminole Nation?
A. No.
Q. Have the persons for whom you make this application received or applied for allotments of land in the Choctaw, Chickasaw, Creek or Seminole Nation?
A. No.
Q. Are there any improvements on the land you have selected for yourself?
A. Yes.
Q. What do the improvements consist of?
A. Homestead-fencing allotment fencing and about 5 acres field balance timber land.
Q. Who is the owner of these improvements?
A. I am.
Q. Does any one else claim this land or any part of it?
A. No.
Q. Are there any churches, school houses or burial grounds on this land?
A. No.
Q. Is that portion of the land which you have designated as a homestead suitable for a home?
A. Yes.

(Signed) JAMES DAY.

INDIAN TERRITORY,
Northern District:

Subscribed and sworn to before me at Muskogee, Oklahoma, this 5th day of May, 1904.

(Signed) SAMUEL FOREMAN,
[SEAL.] *Notary Public.*

H. D.

Department of the Interior. Commission to the Five Civilized Tribes, Cherokee Land Office.

Application for Allotment and Homestead.

I, James Day, do hereby make application to have set apart to me, and to those whom I lawfully represent, lands selected by me as follows:

Roll No. D 120; Name, James Day; subdivision of SE. 10 acres of Lot 2 & E. 20 ac. of W. 21.10 ac. of lot 2 N/2 of NE/4 of NW/4 Sec. 19, Town 26, Rge. 13; acres 50; valuation $200; certificate No. 14228; Homestead S/2 of SE/4 of NW/4 Sec. 19, Town 26, Range 13, acres 20; valuation $80.00; certificate No. 11367.

I, James Day, do solemnly swear that I have in person actually been upon the lands so selected by me for myself and for those whom I represent, as above described, and am lawfully informed as to the location of the same, and the character of the soil, and that I have in good faith selected such lands and will accept the same in allotment for myself and for those whom I represent, and
105 that no part of said lands is lawfully held by any other citizen of the Cherokee Nation.

(Signed) JAMES DAY.

Subscribed and sworn to before me at Tahlequah, I. T. this day of May A. D., 1904.

(Signed) SAMUEL FOREMAN,
[SEAL.] *Notary Public.*

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the disposition of the land of said tribes, and that the above and foregoing is a true and correct copy of the application of James Day to take in allotment the SE10 acres of Lot 2 and the E. 20 acres of Lot 2, and N2 of NE4 of NW4, and S2 of SE4 of NW4 of section 19, township 26 north, range 13 east, in the Cherokee Nation.

J. GEO. WRIGHT,
Commissioner to the Five Civilized Tribes,
By W. S. D. MOORE, *Clerk.*

Muskogee, Okla., Sept. 22, 1908.

PLAINTIFF'S EXHIBIT No. 7.

Department of the Interior, Office of Indian Affairs

G. A. W.

WASHINGTON, *November* 13, 1907.

I, C. F. Larrabee, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached are true copies of the originals as the same appear on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, on the day and year first above written.

[SEAL.]

C. F. LARRABEE,
Acting Commissioner.

C. R. W.—S. D.

PLAINTIFF'S EXHIBIT No. 7A.

Office of Bartlesville Oil and Gas Company.

CONTESTANT'S EX. "A."

MARCH 20TH, 1903.

To the Hon. Dawes Com.

GENTLEMEN: The farm located in the NW¼ of Section 19, Township 26 N., Range 13 E., b-longs to myself and Mr. Geo. B. Keeler and it is perfectly satisfactory with me for him to file on forty acres of it.

Yours truly,

WM. JOHNSTONE.

PLAINTIFF'S EXHIBIT No. 7B.

Office of Bartlesville Gas and Oil Company.

CONTESTANT'S EX. "B."

OCT. 30, 1903.

To the Com. of the Five Civ. Tribes.

GENTLEMEN: The N½ of the NE/4 of NW/4 and the SE¼ of SE¼ of NW¼ Sec. 19, T. 26 N., R.13 E., containing 30
106 acres, which Mr. Geo. B. Keeler let Mr. R. B. Ross have does not belong in the Delaware segregation.

Yours truly,

WM. JOHNSTONE.

PLAINTIFF'S EXHIBIT No. 7C.

Bill of Sale.

BARTLESVILLE, I. T., *Nov.* 1*st*, 1902.

Know all men by these presents that for and in consideration of (100.00) One Hundred dollars cash in hand paid me, the receipt of which is hereby acknowledged I do hereby sell, transfer and deliver unto obert B. Ross the following described improvements together with my right, title and interest in and to the following described land: N/2 of NE/4 of NW/4 of Sec. 19, Twp. 26 N., Range 12 E.; SE/4 of SE/4 of NW/4 of Sec. 19, Twp. 26 N. Range 13 E., and all improvements situated on said land.

In witness whereof, I have hereunto set my hand this the First day of November, 1902.

GEO. B. KEELER.

Witnesses:
W. B. BEDSON.
F. A. GOODYKOONTZ.

Contestant's Exhibit "C" #1181 and 82.

PLAINTIFF'S EXHIBIT No. 7D.

George B. Keeler, Successor to Johnstone and Keeler, General Merchandise, Grain, Live Stock.

BARTLESVILLE, I. T., *April* 5, 1904.

Friend Ross.

DEAR SIR: There has been a party by the name of James Day fenced 10 acres and Buford fenced 20 acres of the 30 I sold you. I had a talk with Johnstone this morn'g. he says they cannot holde it. you must get in and file as soon as the office opens. I and Johnstone will stay with you and I think we can make Cudahys put up something to fight the case. if it comes to a show down I understand your sonee Charley had some posts put around the land. that is good of its Self.

Yours res.,

GEO. B. KEELER.

P. S.—We are having a fine rain to day.

Contestants' Ex. "E," #1181 & 82.

DEFENDANT'S EXHIBIT A.

Copy.

Z. S.

J. W. H. W. C. P. S. V. P.

Refer in reply to the following:

A. A. G.
1500-1907.
G. W. W.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *May* 31, 1907.

The Commissioner of Indian Affairs.

107 SIR: May 16, 1907, your office transmitted the records in the consolidated Cherokee contests, entitled Robert B. Ross V. James Day and Fannie D. Ross V. James Day, Nos. 1181 and 1182, on appeal by the contestee from your office decision of March 6, 1907, in favor of the contestants, the land involved in case number 1181 being the NW/4 of NE/4 of NW/4 and the SE/4 of SE/4 of the NW/4 of Sec. 19, T. 26 north, R. 13 east of the Indian meridian, containing twenty acres, and in number 1182, the NE/4 of the NE/4 of the NW/4 of the same section, containing ten acres.

The contestants are citizens by blood of the Cherokee Nation. The contester is a full blood registered Delaware. All are entitled to allotments in the Cherokee Nation.

Contestee's application of May 5, 1904, for the land described above, was duly allowed. Accordingly, contestants' subsequent application, tendered July 1, 1904, was refused.

Contestants claim they have a preferrence right to select the land by reason of ownership of improvements thereon and possession of the same prior to the date of contestee's application. Opposed to this claim contestee relies upon the fact that he was the first to apply for the tract and asserts in connection therewith that he used and improved the land and resided thereon before he applied for it.

There is no serious difference of opinion as to the facts in the case. The land involved includes two tracts near Bartlesville, one of which contains twenty acres; and the other is a detached piece of land, containing ten acres, and lies south of the former, but in the same quarter section. Both tracts were claimed by the firm of Johnstone and Keeler prior to 1902, and constituted a portion of a large tract which was wholly or partly inclosed at one time by wire fence. The members of the firm divided their holdings between them and Keeler took that part of the land held by them which included the land in contest. November 1, 1902, Keeler transferred his interest in the land last referred to, with the improvements thereon, to the contestant by "bill of sale," witnessed, but not acknowledged before a notary. It is evident that at this time the fencing was pretty well down, and that the land contained no improvements of material value, constituting as it did a portion of the extensive Delaware holdings in which the firm dealt prior to 1902, the extent of their in-

terest in such lands being disclosed in a number of cases. Contestants do not appear to have made any effort to take possession of the place until the fall of 1903.

Then, Mr. Ross, according to his testimony, employed a man to take a load of posts to the place for the purpose of fencing it, but the lines were not located or the posts set at the time. Apparently, nothing further was done until March of the year 1904. Contestant then sent his son, Dr. Charles M. Ross, to look after his interests in the matter. The latter March 1, 1904, visited the land, and with the assistance of a surveyor and two other persons, located the lines of the land in controversy and indicated the same by setting thereon posts or stakes. Dr. Ross testified concerning the work which was done by him and under his supervision that day, and although his testimony was given in the interest of his parents, it shows clearly the unimproved condition of the land at the time. Although he meant, no doubt, to establish priority of improvements he did something else than that, for he testified as follows:

Q. How came you to do this work, Dr.? Did you have instructions from your father?

108 A. Yes, sir, I knew he owned it, and I was going up there for the purpose of looking at some other land, and he asked me to see about this land and to get all the information about it I could, and I went down there and found it woutout any improvements upon it and saw that unless something was done to reduce it to actual possession it would be public doamin.

Q. Did Jas. Day have any improvements of any kind or character upon that land on the 1st day of March, 1904, when you went down there and ran out the lines and placed these posts for the fencing?

A. When I was there on the 1st day of March, 1904, there was absolutely no improvements of any character on it, unless you would consider a few pieces of wire about 8 inches, where it had been cut off of the trees, the old Johnson pasture. No houses, no fencing, no cultivated land except that west half of the north 20.

The cultivation referred to by Dr. Ross included about one and a half acres, and, being the result of the effects of a non-citizen named Bixler, who farmed adjacent lands, can not be credited to contestants.

And bearing further upon the character of the alleged improvements made by Dr. Ross and his associates March 1, 1904 it is observed that the posts used to inclose this thirty acres were cut and set in about five hours; that some of the posts were about the size of a man's arm and others were mere stakes or poles; that they were placed from fifty to one hundred feet apart, except at the corners, where it appears that five posts were set in comparative proximity. The posts bounding the tracts were not joined by wire or otherwise so as to make a connected fence. No further act of improvement or occupation can be fairly conceded the contestants.

Passing now to the testimony of the contestee and his witnesses, it is found that he has lived in the neighborhood of the land for about thirty years; that he alleges he has claimed it for twenty-five years past, and that he has been cutting timber and posts from it,

as well as fuel, all the time. It further appears that when he learned, March 1, 1904, of the efforts being made by Dr. Ross and his party to survey and enclose the land, he immediately went to Bartlesville and purchased $45. of wire with which he proceeded to fence the tract. In so doing he cut part of the posts and bought part. He was assisted by his son and the work required about two and a half days. In constructing the fence two wires were used for the greater part of its length, and the controverted tract was substantially inclosed. In addition, the contestee did that which is also deemed of much importance, but to it no special referrence is made either in your office decision or that of the Commissioner to the Five Civilized Tribes. After fencing the land and before filing thereon he erected a three room house, at a cost of about $250, on one of the tracts, and immediately took up his reisdence therein.

The Department concludes that the fences upon the tract in question at the time of the alleged purchase from Keeler were not of sufficient consequence or value in connection with the land to be entitled to be *calssed* as improvements; that the 1.45 acres of cultivation thereon can not be credited to any one save the non-citizen, Bixler, that the system of posts established by Dr. Ross, March 1, 1904, did not constitute a lawful improvement, and that said posts were set merely for the purpose of marking or defining a prospective allotment. It is further found that the improvements erected by
contestee were built possibly, a li-tle later than the former,
109 but were of material value to the land; also that he actually
entered into possession of the tract. In view of his residence thereon it does not matter that the money used by him in erecting improvements was obtained from an oil company in the form of an advance bonus, particularly as the alleged relation of debtor and creditor seems to have been genuine.

This case comes within the decision of the Department of even date in the Cherokee case of Blakeney V. Bishop, wherein it was held that whatever it alleged to be an improvement must, in order to give a preference right of selection, be truly such, rather than a mere monument to define a prospective allotment. See also decision of even date in the Cherokee case of Bible V. White. In Other words, the purpose to select a given tract can not be effectuated by merely serving notice on the public through the medium of objects placed upon the land in lieu of proper application of the same.

The decision of the Department of November 26, 1900, in the Creek case of Grisoom V. Asbury, No. 16, is relied upon in this and similar cases. There the decision was rendered prior to the ratification of either of the Creek agreements and involved rights in the Creek nation arising under the act of June 28, 1898 (30 Stat., 495), and the law of the tribe enacted prior thereto. Its applicability to a Cherokee case has not been shown, and it is not clear, therefore, that it should be invoked as a precedent for present action. Assuming, however, that the law under which it was decided was clearly analoguous to the law governing the allotment of Cherokee Lands, said decision should be applied with great caution, even as to minors,

and within the limitations prescribed herein and in the decisions of even date in the cases referred to above.

Premises considered, your said decision of March 6, 1907, affirming that of the Commissioner to the Five Civilized Tribes in favor of contestants, is hereby reversed and the land in controversy is awarded to James Day, the contestee.

The papers are herewith returned.

Very respectfully,

JAMES RUDOLPH GARFIELD,
Secretary.

— Inclosures.

DEFENDANT'S EXHIBIT B.

F. R. DEPARTMENT OF THE INTERIOR.

J. W. H.
WASHINGTON, *August* 16, 1907.

d-318.

Cherokee Allotment Contest No. 1181.

ROBERT B. ROSS, Contestant,
vs.
JAMES DAY, Contestee,

With Which is Consolidated Cherokee Allotment Contest No. 1182.

FANNIE D. ROSS, by ROBERT B. ROSS, Her Husband, Contestant,
vs.
JAMES DAY, Contestee.

Review.

The Commissioner of Indian Affairs.

SIR: Receipt is acknowledged of your office letter of July
110 30, 1907, forwarding motion for review of Departmental decision of May 31, 1907, in the Cherokee allotment contest case entitled Ross vs. Day.

In this motion which was filed June 28, 1907, with the Commissioner to the Five Civilized Tribes, it is contended:

"That said decision of the Department is not in accordance with the facts as shown by the records in said causes, nor with the law applicable to the cases under which the said contestants were and are entitled to judgment."

It does not appear from said motion that any material question of fact or law was overlooked by the Department in its decision of May 31, 1907. Therein reference is made to Departmental decisions of the same date in the Cherokee cases of Bible vs. White and Blakeney vs. Bishop.

In these three decisions, which really constitute one so far as the views of the Department are concerned respecting the right to select allotments in the Cherokee Nation by reasons of ownership of improvements, the provisions of law applicable thereto whether found in tribal statutes or in the acts of Congress were carefully considered. It is believed that the conclusion reached in said decisions is just and in accordance with the law.

With the letter dated July 20, 1907, the attorney for the contestants filed the affidavits of J. R. Hill and Lucinda Hill, apparently for the purpose of securing a rehearing or to supplement the record heretofore submitted. If a rehearing was desired these affidavits should have been submitted with proper petition for that purpose within the time limit allowed for filing motions for a rehearing. If said addidavit were intended as supplemental evidence it must be held that they were improperly submitted. Even if they could now be made a part of the record this effect would be to confirm the conclusion heretofore reached.

The request that this cause be referred to the Attorney General for opinion is refused. The question decided in this and the two other cases referred to above is one which has been carefully considered and the Department has no doubt as to the correctness of its conclusions concerning the same.

The motion for review is hereby denied. The papers are returned herewith.

Very respectfully,
(Signed) GEORGE W. WOODRUFF,
Acting Secretary.

A. A. G. 1500-1907. G. W. W.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *May* 31, 1907.

J. W. H. W. C. P. S. V. P.

The Commissioner of Indian Affairs.

SIR: May 16, 1907, your office transmitted the record in the consolidated Cherokee contests, entitled, Robert B. Ross v. James Day and Fannie D. Ross v. James Day, Nos. 1181 and 1182,
111 on appeal by the contestee from your office decision of March 6, 1907, in favor of the contestants, the land involved in case number 1181 being the NW/4 of NE/4 of NW/4 and the SE/4 of SE/4 of the NW/4 of Sec. 19, T. 26 north, R. 13 east of the Indian Meridian, containing twenty acres, and, in number 1182 the NE/4 of the NE/4 of the NW/4 of the same section, containing ten acres.

The contestants are citizens by blood of the Cherokee Nation. The contestee is a full blood registered Delaware. All are entitled to allotments in the Cherokee Nation.

Contestee's application of May 5, 1904, for the land described above, was duly allowed. Accordingly, contestant's subsequent application, tendered July 1, 1904, was refused.

Contestants claim they have a preference right to select the land by reason of ownership of improvements thereon and possession of the same prior to the date of contestee's application. Opposed to this claim contestee relies upon the fact that he was the first to apply for

the tract and asserts in connection therewith that he used and improved the land and resided thereon before he applied for it.

There is no seriour difference of opinion as to the facts in the case. The land involved includes two tracts near Bartlesville, one of which contains twenty acres; and the other is a detached piece of land, containing ten acres, and lies south of the former, but in the same quarter section. Both tracts were claimed by the firm of Johnstone and Keeler prior to 1902, and constituted a portion of a large tract which was wholly or partly inclosed at one time by wire fence. The members of the firm divided their holdings between them and Keeler took that part of the land held by them which included the land in controversy. November 1, 1902, Keeler transferred his interest in the land last referred to, with the improvements thereon, to the contestant by "bill of sale" witnessed, but not acknowledged before a notary. It is evident that at this time the fencing was pretty well down, and that the land contained no improvements of material value, constituting as it did a portion of the extensive Delaware holdings in which the firm dealt prior to 1902, the extent of their interest in such lands being disclosed in a number of cases. Contestants do not appear to have made any effort to take possession of the place until the fall of 1903.

Then Mr. Ross according to his testimony, employed a man to take a load of posts to the place for the purpose of fencing it but the lines were not located or the posts set at the time. Apparently, nothing further was done until March, of the year 1904. Contestant then sent his son, Dr. Charles M. Ross, to look after his interests in the matter. The latter, March 1, 1904, visited the land and, with the assistance of a surveyor and two other persons, located the lines of the land in controversy and indicated the same by setting thereon posts or stakes. Dr. Ross testified concerning the work which was done by him and under his supervision that day, and although his testimony was given in the interest of his parents, it shows clearly the unimproved condition of the land at the time. Although he meant no doubt, to establish priority of improvements, he did something else than that, for he testified as follows:

Q. How came you to do this work, Dr.? Did you have instructions from your father?

A. Yes, sir, I knew he owned it, and I was going up there for the purpose of looking at some other land, and he asked me
112 to see about this land and to get all the information about it I could, and I went down there and found it without any improvements upon it and saw that unless something was done to reduce it to actual possession it would be public domain.

Q. Did Jas. Day have any improvements of any kind or character upon that land on the 1st day of March, 1904, when you went down there and ran out the lines and placed these posts for the fencing

A. When I was there on the 1st day of March, 1904, there was absolut-ly no improvements of any character on it, unless you would consider a few pieces of wire about 8 inches, where it had been cut off of the trees, the old Johnson pasture. No houses, no fencing, no cultivated land except that west half of the north 20.

The cultivation referred to by Dr. Ross included about one and a half acres, and, being the result of the efforts of a non-citizen named, Bixler, who farmed adjacent lands, cannot be credited to contestants.

And bearing further upon the character of the alleged improvements made by Dr. Ross and his associates March 1, 1904, it is observed that the posts used to inclose this thirty acres were cut and set in about five hours; that some of the posts were about the size of a man's arm and others were mere stakes or poles; that they were placed from fifty to one hundred feet apart, except at the corners, where it appears that five posts were set in comparative proximity. The posts bounding the tract were not joined by wire or otherwise so as to make a connected fence. No further act of improvement or occupation can be fairly conceded the contestants.

Passing now to the testimony of the contestee and his witnesses, it is found that he has lived in the neighborhood of the land for about thirty years; that he alleges he has claimed it for twnety-five years past, and that he has been cutting timber and posts from it, as well as fuel, all the time. It further appears that when he learned, March 1, 1904, of the efforts being made by Dr. Ross and his party to survey and enclose the land, he immediately went to Bartlesville and purchased $45 of wire with which he proceeded to fence the tract. In so doing he cut part of the posts and bought part. He was assisted by his son and the work required about two days and a half day. In constructing the fence two wires were used for the greater part of its length, and the controverted tract was substantially inclosed. In addition, the contestee did that which is also deemed of much importance, but to it no special referrence is made either in your office decision or that *or that* of the Commissioner to the Five Civilized Tribes. After fencing the land and before filing thereon he erected a three room house, at a cost of about $250, on one of the tracts, and immediately took up his residence therein.

The Department concludes that the fences upon the tract in question at the time of the alleged purchase from Keeler were not of sufficient consequence or value in connection with the land to be entitled to be classed as improvements; that the 1.45 acres of cultivation thereon cannot be credited to anyone save the non-citizen, Bixler, that the system of posts established by Dr. Ross, March 1, 1904, did not constitute a lawful improvement, and that said posts were set merely for the purpose of marking or defining a
113 prospective allotment. It is further found that the improvements erected by contestee were build, possibly, a little later than the former, but were of material value to the land; also that he actually entered into possession of the tract. In view of his residence thereon it does not matter that the money used by him in erecting improvements was obtained from an oil company in the form of an advance bonus, particularly as the alleged relation of debtor and creditor seems to have been genuine.

This case comes within the decision of the Department of even date in the Cherokee case of Blakeney v. Bishop, wherein it was

held that whatever is alleged to be an improvement must, in order to give a preference right of selection, be truly such, rather than a mere monument to define a prospective allotment. See also decision of even date in the Cherokee case of Bible v. White. In other words, the purpose to select a given tract cannot be effectuated by merely serving notice on the public through the medium of objects placed upon the land in lieu of proper application of the same.

The decision of the Department of November 26, 1900, in the Creek case of Grisson v. Asbury, No. 16, is relied upon in this and similar cases. There the decision was rendered prior to the ratification of either of the Creek agreements and involved rights in the Creek nation arising under the act of June 28, 1898 (30 Stat., 495), and the laws of the tribe enacted prior thereto. Its applicability to a Cherokee case has not been shown, and it is not clear, therefore, that it should be invoked as a precedent for present action. Assuming, however, that the law under which it was decided was clearly analogous to the law governing the allotment of Cherokee lands, said decision should be applied with great caution, even as to minors, and within the limitations prescribed herein and in the decision of even date in the cases referred to above.

Premises considered, your said decision of March 6, 1907, affirming that of the Commissioner to the Five Civilized Tribes, in favor of contestants, is hereby reversed and the land in controversy is awarded to James Day, the contestee.

The papers are herewith returned.

Very respectfully,

JAMES RUDOLPH GARFIELD,
Secretary.

Inclosure.

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole Tribes and the disposition of the lands of said tribes, and that the above and foregoing is a true and correct copy of the decision of the Secretary of the Interior in Cherokee allotment contest No. 1181 entitled Robert B. Ross vs. James Day, rendered May 31, 1907.

THOS. RYAN,
Acting Commissioner.

114 Defendant's exhibit 'C' is identical with the first exhibit attached to defendant's answer. See page 14, this record.

Defendant's exhibit 'D' is identical with the second exhibit attached to defendant's answer. See page 15, this record.

115 That thereafter to-wit. on the 7th day of November, 1908. the said John H. Kane, referee herein, filed his report in accordance with the stipulation and order of reference in words and figures as follows, to-wit:

STATE OF OKLAHOMA,
Washington County, ss:

In the District Court in and for said County and State.

In Equity. No. 389.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner to the Five Civilized Tribes, and JAMES DAY, Defendant-.

Referee's Report.

Honorable T. L. Brown, Judge of District Court, Presiding:

John H. Kane respectfu-ly reports that pursuant to the order of Reference heretofore made and entered by said Court, he has taken the evidence in referrence thereto and finds therefrom as follows.

1. That the plaintiffs Robert B. Ross and Fannie D. Ross are Cherokee Indians by blood, duly enrolled citizens of the Cherokee Nation and entitled as such to allotments of land in the Cherokee Nation.

2. That the defendant James Day is a Delaware Indian by blood, a duly enrolled Delaware Cherokee citizen of the Cherokee Nation and entitled as such to an allotment of land in the Cherokee Nation.

3. That the lands in controversy in this case, to-wit: The North Half (N/2) of North East quarter (NE/4) of North West quarter (NW/4), and the South East quarter (SE/4) of South East quarter (SE/4) of North West quarter (NW/4) of Section Nineteen (19), Township Twenty-six (26) North, Ranhe Thirteen (13) East of the Indian Base and Meridian were applied for by the defendant James Day as a portion of his allotment on the 5th day of May, 1904; that selection was duly made on the 27th day of May, 1904; and that certificates of allotment covering the said land were issued to said James Day by J. George Wright, Commissioner to the Five Civilized Tribes, on the 11th day of November, 1907.

4. That the plaintiff Robert B. Ross made application to the Commission to the Five Civilized Tribes on the 1st day of July, 1904, to have the North-West Quarter (NW/4) of the North-East Quarter (NE/4) of the North-West Quarter (NW/4) and the South East Quarter (SE/4) of South East Quarter (SE/4) of North West Quarter (NW/4) of Section Nineteen (19), Township Twenty-six (26) North, Range Thirteen (13) East, the same being Twenty (20) acres of the land in controversy, allotted to him as a part of his allotment; and on the same date the said Robert B. Ross applied for the North-East Quarter (NE/4) of North East Quarter (NE/4) of North West Quarter (NW/4) of Section Nineteen (19), Township Twenty-six (26) North, Range Thirteen (13) East, the remainder

portion of said lands in controversy, allotted to the plaintiff Fannie D. Ross, his wife, which said applications were refused and the said Robert B. Ross then and there filed his contest and a contest on behalf of the said Fannie D. Ross against the allotment of said lands to the defendant Day.

116 5. That said contests which were known as "Cherokee Allotment Contests Nos. 1181 and 1182" were consolidated and heard and tried by the said Commission to the Five Civilized Tribes as one contest, and upon hearing of the said consolidated contests the decision of the said Commission was rendered in favor of the contestants, the plaintiffs herein; that the contestee, the defendant James Day, herein, having appealed to the Commissioner of Indian Affairs in Washington, D. C. the decision of the said Commissioner to the Five Civilized Tribes was affirmed by that official; and an appeal was taken by the contestee, the said James Day, to the Secretary of the Interior who reversed the Commissioner of Indian Affairs and the Commission to the Five Civilized Tribes and directed that said lands be allotted to the defendant James Day, and the Honorable, the Secretary of the Interior, subsequent to the rendering of said decision, denied a motion of plaintiffs herein, said plaintiffs being parties contestant in said contest cases, for a review of said decision of the said Secretary awarding the land now in suit to defendant Day.

6. That at one time William Johnstone and George B. Keeler had the lands in controversy, together with other lands, enclosed by wire fence, that it cannot be determined definitely from the evidence submitted at what time this said fence deteriorated or was taken away, but is evident that the lands in controversy in this case, together with other lands, constituted a farm which was claimed by and in the possession of the said William Johnstone and George B. Keeler in conjunction on the first day of July, 1902 and prior thereto, that the said William Johnstone is a citizen of the Cherokee Nation by intermarriage and adoption and the said George B. Keeler is a citizen of the Cherokee Nation by blood, that prior to November 1st, 1902 the said Johnstone and Keeler divided the said holdings held in conjunction by them and the said Keeler took that part of the land held by them which includes the said land in controversy.

7. That on November 1st, 1902 the said George B. Keeler transferred to Robert B. Ross, plaintiff herein, by Bill of Sale witnessed but not acknowledged all his right, title and interest in and to all improvements situated on the fol-owing described land, to-wit: The North Half (N/2) of North East Quarter (NE/4) of North West Quarter (NW/4) of Section Nineteen (19), Township Twenty-six (26) North, Range Twelve (12) East, and the South East Quarter (SE/4) of the South East quarter (SE/4) of Northwest Quarter (NW/4) of Section Nineteen (19), Township Twenty-six (26) North, Range Thirteen (13) East, as is evidenced by certified copy of the bill of Sale introduced at Referee's Hearing in this case as Plaintiff's Exhibit C, of which described land the South east quarter (SE/4) of the South east quarter (SE/4) of North west Quarter

(NW/4) of Section Nineteen (19), Township Twenty-six (26) North, Range Thirteen (13) East is involv-d in this case, and the other description of land in said certified copy of the Bill of Sale would indicate the remainin- twenty acres involved in this case if the description read "Range Thirteen (13) East, instead of "Range 12 Twelve East."

8. That immediately prior to March 1, 1904 the improvements on the land involved in this litigation consisted of an acre or two of cultivated land and a wire fence enclosing said acre or two of cultivated land, together with contiguous land, which said improvement was on the North-west Quarter (NW/4) of North-East Quarter (NE/4) of North West Quarter (NW/4) of Section Nineteen (19), Township Twenty-six (26) North, Range Thirteen (13)
117 East, being the West ten acres of the North Twenty acre tract involved in this suit, and short pieces or particles of wire attached to trees where a fence had been cut away.

9. That on the 1st day of March, 1904, Doctor C. M. Ross acting for the plaintiffs Robert B. Ross and Fannie D. Ross, went on the said lands in controversy and with the assistance of the surveyor and other persons located the lines of the two tracts which constitute the lands in controversy, and blazed the same, and set thereon posts or stakes at varying intervals from fifty to seventy-five feet apart, except at the corners of the said two tracts in controversy where five posts were set in comparative proximity.

10. That immediately thereafter on the 1st and 2nd days of March, 1904, defendent James Day, and his employees placed a two wire fence completely about and enclosing the land in controversy and shortly thereafter built a three room frame house on the South Ten acre tract and moved his family thereon and lived in said house for over a year.

11. That the defendent James Day prior to his selection of said land in controversy lived in the neighborhood of said land for a period of thirty years and had for a considerable period owned improvements within a quarter of a mile of the South East corner of the South Ten acre tract of the land involved in this litigation and had owned improvements within three fourths (¾) of a mile from the South-East Corner of the North tract of twenty acres involved in this litigation, and that while the lands in controversy were in the possession of Johnstone and Keeler they were claimed by the defendent James Day, and that the said James Day had from time to time cut timber on the said lands, that other parties not interested in sand lands had also cut timber thereon.

12. That Article 1, Section 2, of the Constitution of the Cherokee Nation, provides in part as follows, to-wit:

"SEC. 2. The lands of the Cherokee Nation shall remain common property, but the improvements made thereon, and in the possession of the citizens of the Nation, are the exclusive and indifeasable right of the citizens respectively who made, or may rightfully be in possession of them; * * * Provided, that the citizens of the Nation possession exclusive and indefeasible right to their improvements as expressed in this Article, shall possess no right or power to dispose

of their improvements, in any manner whatever, to the United States, individual states, or to individual citizens thereof * * *."

That Article 23, Chapter 12 of the Laws of the Cherokee Nation provides as follows in part, to-wit:

"Sec. 706. It shall not be lawful for any citizen of the Cherokee Nation to sell any farm, or other improvement in said Nation, to any person other than a bona-fide citizen thereof * * *."

That Article 3, Chapter 13 of said Laws of the Cherokee Nation, provides in part as follows, to-wit:

"No claim to any place in the Cherokee Nation shall be valid under any act regulating the settlement of public domain, unless the person locating the same shall, within six months hereafter make improvements thereon to the value of $50.00, and be in actual possession thereof, or by agent lawfully resident in the Cherokee Nation, whether such place is to be used as a farm, residence, stock ranch, or place of business."

That Section 760 of the Revised Laws of the Cherokee Nation provides as follows:

118 "No person shall be permitted to settle or erect any improvements or cut and remove timber within one-fourth of a mile of the house, field or other improvement of another citizen without his, her or their consent, under the penalty of forfeiting such improvement and labor for the benefit of the original settler."

That the referree respectfully submits herewith transcript of all the evidence taken by him in this matter, together with exhibits of the plaintiffs and the defendent, offered and enterred at said hearing.

Respectfully submitted,

JOHN H. KANE,
Referree.

Claim of Referree for fees in this matter $100.00.
Claim of Stemographer for services:

To taking testimony 1½ days at $5.00 per day	$7.50
To transcribing notes 392 folios at $.06 per folio	23.52
Total	$31.02

Endorsed on back as follows: 389. In Equity No. 389. Robert B. Ross and Fannie D. Ross vs. J. George Wright, Commissioner to the Five Civilized Tribes, and James Day. Referree's Report. District Court Washington County, Filed in open Court, Nov. 7, 1908. John B. Churchill, Clerk. Entered.

That thereafter to-wit: On the 24th day of February, 1909 this cause being called in the District Court for the Second Judicial District of the State of Oklahoma, for trial, the plaintiffs herein, filed in said Court, sitting at Bartlesville for Washington County, their motion for judgment against the defendent Day in words and figures fol-owing, to-wit:

In the District Court for the Second Judicial District, State of Oklahoma, Sitting at Bartlesville for Washington County.

Civil, No. 389.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner, etc., and JAMES DAY, Defendents.

Plaintiff's Motion for Judgment.

Comes now the plaintiffs herein, the said Robert B. Ross and Fannie D. Rossm by their solicitor, Kenneth S. Murchison and moves the Court for judgment and decree against the defendent, James Day, as prayed for in their petition, on the ground that said plaintiffs are entitled to the relief prayed for upon the report of facts found by the referree herein and under the law applicable to this cause.

KENNETH S. MURCHISON,
Solicitor for Plaintiffs.

Endorsed on back as follows: #389. Robt. B. Ross and Fannie D. Ross, plaintiffs, vs. J. Geo. Wright, etc., and James Day,
119 Defendents. Equity 389. Plaintiffs' motion for judgment. District Court Washington County Oklahoma. Filed in Open Court Feb. 24, 1909. John B. Churchill, Clerk. Entered. Kenneth S. Murchison, Solicitor for Plaintiffs.

And on the same date to-wit on the 24th day of February, 1909, the defendent herein, the said James Day, filed his motion to strike from the files of the Court all of the testimony and the report of the referree herein in words and figures as follows:

In the District Court for Washington County State of Oklahoma.

ROBERT. B. Ross et al., Plaintiff-,
vs.
JAMES DAY, Def't.

Comes now the defendent and moves the Court to strike from the files all of the testimony taken herein by the referree and all evidence introduced herein before said Referree and the report of the referree filed herein upon the facts found by him herein for the following reasons, to-wit:

1st. Because plaintiffs' amended petition does not state facts sufficient to constitute a cause of action against the defendent.

2nd. Because the facts found by the Secretary of the Interior and contained in his decision rendered in consolidated Cherokee Contest cases numbers 1181 and 1182 wherein Robert B. Ross vs. James Day

and Fannie D. Ross vs. James Day were parties respectively involving the lands sued on herein, on the 31st day of May, 1907 are conclusive upon this Court.

3. Because plaintiffs' complaint does not allege those facts necessary to warrant this Court in enquiring into the facts before the Secretary of the Interior which were the basis of his decision rendered in the contest cases above set out.

VEASEY AND ROWLAND,
Att'y. for Def't. Day.

Endorsed on back as follows: 389. District Court Washington County Oklahoma. Filed in Open Court, Feb. 24, 1909, John B. Churchill, Clerk. Entered.

And this cause being argued on the 24th day and 25th day of February, 1909, on the motion of the plaintiff for judgment and the motion of the defendent to strike the Referree's report and testimony the Court handed down a decree interlocutory in its character in words and figures as follows; to-wit:

STATE OF OKLAHOMA,
Washington County, ss:

In the District Court in and for Said County and State.

ROBERT B. Ross and FANNIE D. Ross, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner to the Five Civilized Tribes and JAMES DAY, Defendents.

Decree.

On this 25 dao of Feb. 1909 come the parties by their
120 counsel and this cause is submitted to the court upon the report of the Referree as to his findings of facts made herein.

Whereupon, the plaintiff files his motion for judgment against the defendent upon said findings of said Referree, which said motion, after argument of counsel thereon, was by the Court overruled, to which action of the Court, the plaintiff at the time duly excepted.

Whereupon, The Court set aside the findings and report of said referree, and proceeded to hear and determine said cause upon the evidence taken herein and upon arguments of Counsel.

After the conclusion of said arguments, the Court, not being fully advised in the premises, took said cause under advisement.

Witness the hand of the Court.

T. L. BROWN, *Judge.*

Endorsed on back: District Court, No. 389. Robert B. Ross and Fannie D. Ross, Plffs. vs. J. George Wright, Commissioner *ro* the Five Civilized Tribes and James Day, Defendents. Decree District Court, Washington County, Okla. Filed Mar. 26, 1909, —— —— Clerk. Veasey and Rowland Attorneys at Law, Bartlesville, Okla. Entered.

Therefore to wit: on the 3rd day of March, 1909, a final decree of the Court was signed in words and figures as follows; to-wit:

STATE OF OKLAHOMA,
Washington County, ss:

In the District Court in and for said County and State.

ROBERT B. ROSS and FANNIE D. ROSS, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner to the Five Civilized Tribes, and JAMES DAY, Defendents.

On this 3rd day of March, 1909, come now the parties by their counsel and the Court being now fully advised in the premises, finds for the defendent:

It is therefore ordered and adjudged by the Court: That the plaintiff- take nothing by their suit herein and that the defendent have and recover of the plaintiff- the costs including the referree's costs and expenses.

To which judgment of the Court, the plaintiff then and there duly excepted.

The plaintiffs then asks and *is* allowed ninety (90) days in which to make and serve upon the deefndent his case made herein and the defendent is allowed the further period of thirty (30) days from the making and serving of said case made in which to suggest amendments thereto. Said case made to be finally settled by the Court upon five (5) days' notice from each to the other of the parties hereto.

Witness the hand of the Court.

T. L. BROWN, *Judge*

Endorsed on back. District Court No. 389. Robert B. Ross and Fannie D. Ross Plaintiffs, vs. J. George Wright, Commissioner to the Five Civilized Tribes and James Day, defendents. District
121 Court Washington County, Okla. Filed Mar. 26, 1909. John B. Churchill, Clerk. Entered? Veasey and Rowland Attorneys Bartlesville, Okla.

122 In the District Court for the Second Judicial District State of Oklahoma sitting at Bartlesville for Washington County.

Civil, No. 389.

ROBERT B. ROSS AND FANNIE D. ROSS, Plaintiffs,
vs.
J. GEORGE WRIGHT, Commissioner to the Five Civilized Tribes, and JAMES DAY, Defendents.

Verification of Case Made.

I, the undersigned, T. L. Brown, Judge of the District Court of the Second Judicial District State of Oklahoma, Washington County,

hereby certify that the foregoing was presented to me as a case made on appeal to the Supreme Court of the State of Oklahoma in the above entitled action, the plaintiff- being present by counsel and the defendant- being present by *his* counsel and waived the suggestion of amendment thereto and consented that the same be presented and settled immediately and without further notice; and the defendant through *his* counsel having joined with the plaintiffs in the request that the undersigned Judge settle the said case made and order the same to be certified by the Clerk of the above named District Court, and filed as provided by law. And I, the said T. L. Brown Judge now settle and sign the same as a true, correct and complete case made in the above entitled action, and direct that it be attested and filed by the Clerk of said District Court.

Witness my hand at Nawata in Nawata County, Oklahoma, on this 15 day of June, 1909.

[SEAL.] T. L. BROWN,
District Judge.

Attest:
JOHN B. CHURCHILL, *District Clerk.*

Filed Jun- 30, 1909.

W. H. L. CAMPBELL, *Clerk.*

123 In the District Court for the Second Judicial District State of Oklahoma sitting at Bartlesville for Washington County.

Civil, No. 389.

ROBERT B. ROSS AND FANNIE D. ROSS, Plaintiffs,
VS.
J. GEORGE WRIGHT, Commissioner to the Five Civilized Tribes, and JAMES DAY, Defendants.

Clerk's Certificate to Transcript.

STATE OF OKLAHOMA,
County of Washington, ss:

I, John B. Churchill, Clerk of the District Court for the County of Washington, State of Oklahoma, do hereby certify that the above and foregoing is a full, true, complete and correct transcript of the record in the above entitled cause, as settled and verified by the Honorable T. L. Brown District Judge for said County and State.

In Testimony whereof, I have hereunto set my hand and affixed the seal of the Court, this — day of June, 1909.

[SEAL.] JOHN B. CHURCHILL,
District Clerk.

Filed Jun- 30, 1909.

W. H. L. CAMPBELL, *Clerk.*

124 [Endorsed:] No. 927. Robt. B. Ross, et al, vs. James Day, Petition in Error and Case made. Filed Jun- 30, 1909. W. H. L. Campbell, Clerk.

125 & 126 In the Supreme Court of the State of Oklahoma.

No. 927.

ROBERT B. Ross and FANNIE D. Ross, Plaintiffs in Error,
vs.
JAMES DAY, Defendant in Error.

Motion of Defendant in Error to Dismiss or Affirm.

Veasey & Rowland, Kenneth H. Davenport, Attorneys for Defendant in Error.

Filed Jul- 16, 1909. W. H. L. Campbell, Clerk.

127 In the Supreme Court of the State of Oklahoma.

No. —.

ROBERT B. Ross and FANNIE D. Ross, Plaintiffs in Error,
vs.
JAMES DAY, Defendant in Error.

Motion to Dismiss or Affirm.

Comes now James Day, Defendant in error herein, by Veasey and Rowland and Kenneth H. Davenport, his Attorneys, and respectfully moves the Court to dismiss the petition in error hereto-fore filed herein, or to affirm the judgment of the court
128 below, and as ground for said motion shows the court that no motion for a new trial was filed or overruled in the court below and that no errors are assigned in the petition in error which can be raised in the absence of such motion.

VEASEY & ROWLAND,
KENNETH H. DAVENPORT,
Attorneys for the Defendant in Error.

Brief in Support of Motion to Dismiss or Affirm.

This case comes here upon petition in error to review a judgment of the district court of the Second Judicial District sitting at Bartlesville, Oklahoma, in Washington County. The petition in error contains the following assignments of error:

"First. The Court erred in overruling the motion of plaintiffs for judgment on the report of the referee at the trial of this cause in the court below, to which action of the court the plaintiffs and each of them at the time duly excepted.

"Second. The court below erred in setting aside the findings and report of the Referee and proceeding to hear and determine the cause

upon vidence taken in the case and upon arguments of the counsel to which ruling of the court the plaintiffs herein and each of them then and there duly excepted.

"Third. The court erred in the final decree in finding and ruling for the defendant and in not finding for the plaintiff to which finding and ruling of the court, the plaintiffs and each of them then and there excepted.

"Fourth. The court erred in that its finding for the defendant is not warranted by the evidence taken in said cause, is not
129 supported by the law nor the facts as found and reported by the Referee to which findings the plaintiffs excepted.

"Fifth. The court erred in decreeing "That the plaintiffs take nothing by their suit herein and that the Defendant recover from the plaintiffs the costs, including the Referee's costs and expenses, to which decree the plaintiffs and each of *of* them then and there excepted.

It will be perceived that the consideration of each of the assignments of error necessitates a review of the evidence and of the propriety of the rulings of the trial court at the trial.

The rule is settled in this state that if a party wishes to take advantage of such errors, he must first present them by a motion for a new trial in the court below, in order that the opportunity may be given, if errors have in fact been committed, to correct them there. The Supreme Court of the Territory of Oklahoma has repeatedly decided that assignments of error of this character do not suffice to bring before the court any matters for review unless a motion for a new trial has been duly filed and overruled in the trial court and unless the action of that court, in overruling the motion is assigned as error.

De Berry v. Smith, 2 Ok. 1.
Beall v. Mutual Life Insurance Co. 7 Ok. 285.
McDonald v. Carpenter 11 Ok. 115.
Glaser v. Glaser, 13 Ok. 389.
Bradford v. Brennan 15 Ok. 47.

It is not assigned as error here that the court below erred in overruling the motion for a new trial; and it appears
130–132 from the case filed herein that no such motion was in fact filed or passed upon by the district court.

There is, therefore, no question for review properly b-ought before this court and it is respectfully submitted that the petition in error should be dismissed or the judgment of the district court affirmed peremptorily.

VEASEY & ROWLAND,
KENNETH H. DAVENPORT,
Attorneys for Defendant in Error.

133 And thereafter to-wit: on the 27th day of July 1909, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, July Term, 1909, July 27th, 1909, Seventh Judicial Day.

#927.

ROBERT B. ROSS et al., Plaintiffs in Error,
vs.
JAMES DAY, Defendant in Error.

Ordered by the court that the motion in the above cause to make óral argument on motion to dismiss, be, and the same is hereby overruled.

134 And thereafter, to-wit: on the 1st day of February, 1910, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause:

In the Supreme Court, January Term, 1910, February 1st, 1910, Eighteenth Judicial Day.

#927.

ROB'T ROSS et al., Plaintiffs in Error,
vs.
JAMES DAY, Defendant in Error.

Ordered by the court that the motion to dismiss filed herein, be, and the same is hereby overruled.

135 And thereafter, to-wit: on the 23rd day of May, 1911, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, May Term, 1911, May 23rd, 1911, Second Judicial Day.

#927.

ROB'T B. ROSS et al., Plaintiffs in Error,
vs.
JAS. DAY, Defendant in Error.

And now on this day the above cause is argued orally on behalf of plaintiffs in error, and the cause is submitted on the record, briefs and oral argument.

136 And thereafter, to-wit: on the 27th day of June 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, May Term, 1911, June 27th, 1911, Fourth Judicial Day.

#927.

ROBERT B. Ross et al., Plaintiffs in Error,
vs.
JAMES DAY, Defendant in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the lower court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the lower court in the above cause be, and the same is hereby affirmed.

Opinion by Dunn, J., All the Justices concur.

137 Filed June 27, 1911. W. H. L. Campbell, Clerk.

No. 927.

In the Supreme Court of the State of Oklahoma.

ROBERT B. Ross and FANNIE D. Ross, Plaintiffs in Error,
vs.
J. G. WRIGHT and JAMES DAY, Defendants in Error.

Syllabus.

1. Where a suit in equity is begun in one of the United States Courts for the Indian Territory, and after statehood transferred to the district court of one of the counties of the state, alleged errors of law occurring on the trial may be reviewed in this court without a motion for a new trial.
2. One who would attack a patent or decision of the department for a mistake of fact, must plead and prove the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fact that, if it had not been made, the decision would have been otherwise, and the patent would not have issued to the patentee, before any court can enter upon the consideration of the original issue of fact determined by the department.
3. Allotments of lands of citizens of the Cherokee Nation were made under the provisions of an Act of Congress, dated July 1st, 1902 (32 Stat. L. 716) entitled, "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and thereunder citizens of the Cherokee Tribe, of Indians were

entitled to select as their allotments, lands upon which were located their improvements and the setting of posts merely for the purpose of marking or defining a prospective allotment was not sufficient to constitute a lawful improvement.

4. While a decision of the land department on matters of law are not binding on the courts, they should not be annulled unless they are clearly erroneous.

Error from the District Court of Washington County.

T. L. Brown, Trial Judge.

Affirmed.

Kenneth S. Murchison, Attorney for Plaintiffs in Error.
Veasey & Rowland, J. D. Talbott, and Kenneth H. Davenport, Attorneys for Defendants in Error.

138 *Opinion of the Court by Dunn, J.*

This case presents error from the district court of Washington county, and equity suit brought by plaintiffs in error as plaintiffs, in one of the United States Courts for the Indian Territory, sitting at Muskogee. After the cause was begun, plaintiffs dismissed as to the defendant, J. G. Wright, commissioner, and continued as against James Day. Thereafter, on September 11th, 1908, defendant filed his answer to plaintiffs' complaint. After the issues were made up the cause was submitted to a referee who filed his report on the 7th day of November, 1908, containing, in accordance with the order under which he was appointed, his findings of fact. Thereafter and on the 25th day of February, 1909, the court denied a motion filed by plaintiffs for a judgment against the defendant upon the findings of the referee, and setting aside the findings and the report, proceeded to hear and determine the cause upon the evidence taken. Thereafter, and on the 3rd day of March, 1909, the court rendered its judgment, finding in all things for the defendant and decreeing that the plaintiffs take nothing by their action. To review the judgment rendered, the cause has been duly lodged in this court.

Counsel for defendant have filed a motion to dismiss the proceeding in error because of the fact that no motion for a new trial was filed in the court below. This action being one in equity and having been begun prior to statehood, was appealable and subject to review on the record made without the filing of a motion for new trial. Jones v. Robinson et al., 4 Ind. Ter. 556, 76 S. W. 107. See Sec. 1, Schedule to the Constitution, (Snyder's Const. p. 380).

Passing directly to the merits of the action and considering those questions only which in our judgment it is essential for us to consider, we will say that the action is brought for the purpose of securing a decree constituting of the defendant a trustee to hold title to the land involved, which lies in the Cherokee Nation, for plaintiffs' benefit and that plaintiffs be held to be entitled to the same as

part of their allotments as members of the Cherokee Tribe.
139 The defendant originally entered the same as his allotment and plaint-ffs brought contest which on being carried to the Secretary of the Interior, was decided against them and in favor of defendant. The essential portions of the decision of the Secretary of the Interior rendered, are as follows:

"There is no serious difference of opinion as to the facts in the case. The land involved includes two tracts near Bartlesville, one of which contains twenty acres, and the other is a detached piece of land containing ten acres and lies south of the former, but in the same quarter section. Both tracts were claimed by the firm of Johnstone & Keeler prior to 1902, and constituted a portion of a large tract which was wholly or partially enclosed at one time by wire fence. The members of the firm divided their holdings between them, and Keeler took that part of the land held by them which included the land in contest. November 1, 1902, Keeler transferred his interest in the land last referred to, with the improvements thereon, to the contestant by 'Bill of sale' witnessed but not acknowledged before a notary. It is evident that at this time the fencing was pretty well down, and that the land contained no improvements of material value, constituting as it did a portion of the extensive Delaware holdings in which the firm dealt prior to 1902, the extent of their interests in such lands being disclosed in a number of cases. Contestants do not appear to have made any effort to take possession of the place until the fall of 1903. Then, Mr. Ross, according to his testimony, employed a man to take a load of posts to the place for the purpose of fencing it, but the lines were not located or the posts set at that time. Apparently nothing further was done until March of the year 1904. Contestant then sent his son, Dr. Charles M. Ross, to look after his interests in the matter. The latter, on March 1, 1904, visited the land, and with the assistance of a surveyor and two other persons located the lines of the land in controversy and indicated the same by setting thereon posts or stakes. Dr. Ross testified concerning the work which was done by him and under his supervision that day, and although his testimony was given in the interest of his parents, it shows clearly the unimproved condition of the land at that time * * *. And, bearing further upon the character of the alleged improvements made by Dr. Ross and his associates March 1, 1904, it is observed that the posts used to inclose this thirty acres were cut and set in about five hours; that some of the posts were about the size of a man's arm and others were mere stakes or poles; that they were placed from fifty to one hundred feet apart, except at the corners, where it appears that five posts were set in comparative proximity. The posts bounding the tracts were not joined by wire or otherwise so as to make a connected fence. No further act of improvement or occupation can be fairly conceded the contestants. Passing now to the testimony of the contestee and his witnesses, it is found that he has lived in the neighborhood of the land for about thirty years; that he alleges that he has claimed it for twenty-five years past, and that he has been cutting timber and posts from it, as well as fuel, all the time. It

further appears that when he learned March 1, 1904, of the efforts made by Dr. Ross and his party to survey and enclose the land he immediately went to Bartlesville and purchased $45.00 of wire, with which he proceeded to fence the tract. In so doing he cut part of the posts and bought part. He was assisted by his son, and the work required about two and a half days. In constructing the fence, two wires were used for the greater part of its length, and the controverted tract was substantially enclosed. In addition,
140 the contestee did that which is also deemed of much importance, but to it no special reference is made in either your office decision or that of the Commissioner to the Five Civilized Tribes. After fencing the land and before filing thereon he erected a three room house, at a cost of about $250.00, on one of the tracts, and immediately took up his residence therein. The department concludes that the fences upon the tract in question at the time of the alleged purchase from Keeler were not of sufficient consequence or value in connection with the land to be entitled to be classed as improvements; that the 1.45 acres of cultivation thereon cannot be credited to anyone save the non-citizen Bixler; that the system of posts established by Dr. Ross, March 1, 1904, did not constitute a lawful improvement, and that said posts were merely set for the purpose of marking or defining a prospective allotment. It is further found that the improvements erected by contestee were built possibly a little later than the former, but were of material value to the land; also that he actually entered into possession of the tract * * *."

To annul this decision counsel for plaintiffs relies upon two propositions, first, that the facts as they were established before the department were misapprehended, and second, that in his decision, the Secretary of the Interior did not take into consideration the laws of the Cherokee Nation which he contended provide the rule for the determination of the right to the possession of the lands in controversy as between the contesting parties.

On the first proposition, which is that the department misapprehended the facts, neither plaintiffs' pleading nor proof bring them within the rule applicable where patents are set aside because of the action of the department upon the facts. In such cases it must be pleaded and proven that either through fraud or gross mistake it fell into a misapprehension of the facts proved. Gonzalez v. French et al., 164 U. S., 338, 344, 17 Sup. Ct. 102, 41 Law ed., 458. When attack is made on a patent on this ground, to avoid the department's findings of fact, the party must allege and prove not only that there was a mistake in the finding, but the evidence before the department from which the mistake resulted must be established to the end that the particular mistake which was made and the way in which it occurred or the fraud, if any, which induced it, may be before the court as a trial which takes place in a case of this character is in effect a trial of the contest case itself for the purpose of ascertaining whether it has been correctly determined on the law and
141 facts, the presumption, of course, being that the decision of the land department is correct, and this presumption will

obtain until it has been overcome in the manner indicated. McKenna v. Atherton, 160 Fed., 547; James et al. v. Germania Iron Co., 107 Fed., 597; Durango Land & Coal Co. v. Evans et al., 80 Fed., 425.

The syllabus in the case of James et al. v. Germania Iron Co., supra, is as follows:

"One who would attack a patent or decision of the department for a mistake of fact, however, must plead and prove the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fact that, if it had not been made, the decision would have been otherwise, and the patent would not have issued to the patentee, before any court can enter upon the consideration of the original issue of fact determined by the department."

Speaking to the same point, the Circuit Court of Appeals of the 8th Circuit, Thayer, Circuit Judge, in the discussion of the case of Durango Land & Coal Co. v. Evans et al., supra, said:

"The doctrine is too well settled to admit of any controversy that the decisions of that tribunal upon questions properly pending before it can only be annulled when such fraud or imposition is shown to have been practiced as prevented the unsuccessful party in a contest from fully presenting his case, or the officers composing the tribunal from fully considering it, or when such officers have themselves been guilty of fraudulent conduct, or when it is made to appear that, upon the case as established before the land department, the law applicable thereto was misconstrued or misapplied. If fraud is charged as a ground for annulling a decision of the land department, it is not enough that false testimony or forged documents have been employed; but it must be made to appear that such false testimony has affected the decision, and led to a result which otherwise would not have been reached. And inasmuch as the findings of the land department on questions of fact are conclusive, when the charge is that the land department has erred in the decision of a mixed question of law and fact, what the facts were, as laid before and found by the department, must be shown, so as to enable the court to see clearly that the law has been misconstrued."

The court then said:

"These propositions have been so frequently stated and applied that it is hardly necessary to repeat them." (Citing a number of authorities.)

In the absence, therefore, of either pleading or proof of the evidence taken on the contest, the question of any misapprehension as to facts is not before us for our consideration.

142 It is counsel's claim under his second proposition that the rights of the parties should have been determined under Sec. 762 of the Laws of the Cherokee Nation, published by an Act of the National Cherokee Council in 1892, instead of the statutes of Congress; this section reads as follows:

"No claims to any place in the Cherokee Nation shall be valid under any act regulating the settlement of the Public Domain, unless

the person locating the same shall, within six months thereafter make improvements thereon to the value of $50.00, and be in actual possession thereof, or by agent lawfully resident in the Cherokee Nation, whether such place is to be used as a farm, residence, stock ranch, or place of business."

It is the contention of counsel that this law applied in reference to the allotting of the land involved and that had the department recognized the same, plaintiffs would have been successful in the contest case and that a failure to recognize this statute is the reason that the land was allotted to their adversary and not to them.

Sec. 11 of an Act of Congress, dated July 1, 1902, (32 Stat. L. 716), entitled, "An Act to provide for the allotment of the lands of the Cherokee Nation, and for the disposition of town sites therein, and for other purposes," reads as follows:

"There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, lands equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the acreas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

It is to be noted that the Secretary of the Interior in his decision concludes that the acts of plaintiffs of March 1, 1904, did not constitute a lawful improvement, that the posts set were set merely for the purpose of marking or defining a prospective allotment and were not improvements as contemplated in the Federal statute. Necessarily to the extent of any conflict between the Federal statute and the law of the Cherokee Nation, the former controls, be-
143 cause Congress has plenary legislative authority in all matters relating to the Indian tribes and their affairs. Lone Wolf et al. v. Hitchcock, 187 U. S. 553, 47 Law ed. 299; Gleason et al. v. Wood, an opinion recently handed down by this court but not yet officially reported. The Cherokee act was a rule established by that Nation prior to the Congressional allotting act for the control of internal affairs relating to its people and their lands and therein was recognized a right growing out of a claim or mere location on the public domain. Doubtless under the operation of this act, where acts were done amounting to the making of a claim or location sufficient to give notice of the intended claim or location and the improvements were thereafter made in accordance with the law, the right would date back to the time of the making of the claim or location. This right was recognized by this act and it is this right along with the claim that the posts constituted improvements which counsel for plaintiffs seek to have recognized by this court and which he says the Secretary of the Interior ignored. The Federal statute and the rules and regulations of the Department of the Interior made thereunder providing the law and the procedure governing the allotment of the land of this tribe, were passed long after this act, and did not recognize this location right established by the Cherokee

law but provided as we have seen, that the allotments might be selected by each allottee so as to include—not his claim or location, but—his improvements. If an allottee did acts upon a tract of land which would meet the requirements of the statute and sufficient to be denominated improvements, then, if first in time, he would and should be held to be first in right. The construction and holding of the Secretary of the Interior we deem fully justified by the statute which we hold superseded the Cherokee law on the subject, and on the question of whether the posts were improvements, we are not able to say that the conclusion of the Secretary on the evidence before him was wrong, for, while conclusions of law reached by
144 the department on conceded facts are not binding upon the courts, it has been held that they should not be set aside nor annulled unless they are clearly erroneous. Hand et al. v. Cook et al., 29 Nev. 518, 92 Pac. 3.

We have carefully considered the claims made by plaintiffs in connection with the conclusion reached by the Secretary of the Interior, and finding no error in the judgment and decision of the trial court concurring in the same, the judgment rendered is accordingly affirmed.

Turner, C. J., Williams, Kane, and Hayes, JJ. concur.

145 And thereafter, to-wit: on the 12th day of July 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, July Term, 1911, July 12th, 1911, Second Judicial Day.

#927.

Ron't B. Ross et al., Plaintiffs in Error,
vs.
James Day, Defendant in Error.

And now on this day it is ordered by the court that the mandate of this court in the above cause, be, and the same is hereby stayed for a period of 60 days.

146 In the Supreme Court of Oklahoma.

Robert B. Ross and Fannie D. Ross, Plaintiffs in Error,
vs.
J. George Wright and James Day, Defendants in Error.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto do hereby certify that the foregoing pages numbered from 1 to 145, both inclusive, contain a true, perfect and complete copy of the record and

proceedings had in the above entitled cause in said Court, including a certified copy of the opinion of the Court, and that pages 6, 7 & 8 contain a true and correct copy of the assignment of errors upon said record filed in said Court on the 11th day of September, A. D. 1911, the original of which remains on file and of record in my said office.

In testimony whereof, I have hereunto set my hand and caused the seal of the said Supreme Court of Oklahoma to be hereunto affixed at Oklahoma City, Oklahoma, this 7" day of October, in the year of our Lord one thousand nine hundred and eleven.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of Supreme Court,
By JESSIE PARDOE, *Deputy.*

ndorsed on cover: File No. 22,927. Oklahoma Supreme Court. Term No. 122. Robert B. Ross and Fannie D. Ross, plaintiffs in error, vs. James Day. Filed November 7th, 1911. File No. 22,927.

INDEX

AUTHORITIES.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1913.

No. 122.

ROBERT B. ROSS and FANNIE D. ROSS,
Plaintiffs in Error,

vs.

JAMES DAY, ***Defendant in Error***

BRIEF AND ARGUMENT IN BEHALF OF PLAINTIFFS IN ERROR.

Statement of the Case

This cause is pending in this court on a writ of error to the Supreme Court of the State of Oklahoma for the correction of errors apparent of record in the opinion and judgment of that court as more specifically shown by the assignment of error on page four of the record.

This is an action brought on the equity side of the court in the United States Court for the Indian Territory sitting in Muskogee for the Western District of said territory and originally brought against J. George Wright, Commissioner to the Five Civilized Tribes, and James Day, defendants, before statehood, the suit being commenced in that court on the fourth day of October, 1907, as shown by the record, pages 8 to 16 inclusive.

On the 16th day of November, 1907, the State of Oklahoma was admitted into the Union as a state and the cause became pending in the District Court for the Third Judicial District of said state sitting at Muskogee for Muskogee County. During the month of March, 1908, on the motion of the plaintiffs the action in that court was dismissed as to the defendant J. George Wright, commissioner.

The plaintiffs in error, who were the plaintiffs below, by their petition presented to the court their complaint in which it was alleged among other things that the plaintiffs were citizens of the Cherokee Nation by blood, and, as such, entitled to allotments of the lands of the Cherokee Nation; that the defendant Day was a citizen of the Cherokee Nation by adoption, being an Indian of Delaware blood and residing near the town of Bartlesville, Indian Territory (now Washington County, State of Oklahoma); that by article 1, section 2 of the Constitution of the Cherokee Nation, the citizens of said nation were and

are secure in their right of property in the improvements made by them respectively or of which they might be in lawful possession. That under the laws of the Cherokee Nation in force in the year 1902 and at all times since that year, the citizens of the Cherokee Nation or tribe who might acquire them were secured in all of the rights in and to such improvements as were previously enjoyed by (Rec., p. 9) the original owner or maker of such improvements and set up in said petition the law referred to (Rec., p. 10). The petition of the plaintiffs further alleges that, by the Act of Congress approved July 1, 1902, providing for the allotment in severalty of the lands of the Cherokee Indians, which was ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation on the 7th day of August, 1902, provided in section 11:

> "There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allotable lands of the Cherokee Nation to conform as nearly as may be to the areas and boundaries established by the Government survey which land may be selected by each allottee so as to include his improvements." (Rec., p. 10.)

That George B. Keeler, a citizen of the Cherokee Nation by intermarriage had previously to the

first day of November, 1902, enclosed and held in undisputed possession a large body of land in the Cherokee Nation embracing, among other tracts, the N2 of the NE4 of the NW4 and the SE4 of the SE4 of the NW4 of section 19, township 26 north, range 13 east of the Indian base and meridian, containing thirty acres more or less, and that the said George B. Keeler prior to the said first day of November, 1902, had orally agreed to transfer to the plaintiff, Robert B. Ross for himself and his wife, the above described land which he did by a bill of sale on the said first day of November, 1902, and pursuant to his right under the laws of the Cherokee Nation referred to. The bill further states that for the purpose of separately fencing the tracts above described as having been obtained from George B. Keeler, the plaintiff in error, Robert B. Ross, in 1903 had hauled to the land and left there about one hundred posts such as are used for fencing and on the first day of March, 1904, the son of the plaintiffs in error, Dr. Charles M. Ross, together with others employed to assist him, and by the direction and authority of the said plaintiffs went on the said tracts and set up posts thereon preparatory to erecting fences to separately enclose them; that at the time they were there for the purpose of separately fencing said tracts, said Charles M. Ross, as the plaintiffs are informed, met the defendant Day, talked with him about the improvements being made thereon the land, and that Day made no objections

thereto, but disclaimed any interest in the lands described or any lands on the west side of the Caney River at that point (Rec., p. 11). That plaintiffs in error further allege in their complaint that on the first day of March, 1904, when said Charles M. Ross made the improvements therein described there were no improvements on the land of any kind or character except some cultivation on a small portion of the land, and the lands were not in the possession of, nor were they claimed by any citizen of the Cherokee Nation other than the plaintiffs in error, and that the said Charles M. Ross, acting for and under the authority of the plaintiffs, made certain improvements thereon described in the petition (Rec., pp. 11 and 12).

The plaintiffs further allege that under the laws of the Cherokee Nation, section 762 Laws 1892, page 377, six months time was allowed every citizen, who made a location on the public domain, to make improvements thereon to the value of fifty dollars, and claim that the acts of location by Charles M. Ross for the plaintiffs, on or about the first day of March, 1904, secured to the plaintiffs the right of possession of the tract described as against all other citizens of the Cherokee Nation for the period of six months from the date of such location, independently of the right acquired by the bill of sale from George B. Keeler, and even though the improvements placed on the tract at that time were of less value than

$50.00, but plaintiffs express the belief and averred that the improvements made by said Charles M. Ross, added to the improvements of value already thereon and belonging to the plaintiffs, were reasonably worth more than the sum of $50.00.

The bill of complaint of the plaintiffs in error then recites that after the said Charles M. Ross left the premises, to-wit, either late in the afternoon of the same day, or during the night following, or early in the morning of the next day, the defendant Day with other persons and parties, unknown to the plaintiffs, went upon the premises and proceeded to fence with wire the tracts of land claimed by these plaintiffs, together with other tracts in one large body, and, later on, at a date unknown to the plaintiffs in error, the defendant Day, in order to further strengthen his claim and fraudulently deprive the plaintiffs of their rights, erected a small house in the vicinity of one of said tracts of land and adjoining thereto, which he afterwards moved upon said tract. The bill further states that the lands described are supposed to be rich in deposits of oil and gas and of great value; that the defendant Day, for the purpose of depriving these plaintiffs in error of their just right to allot said land, made application to the Commission to the Five Civilized Tribes at Tahlequah in the Indian Territory on the 5th day of May, 1904, to have the above described tracts of land allotted to him as part of his allotment as an adopted

citizen of the Cherokee Nation; that as soon after the 5th day of May, 1904, as the plaintiff, Robert B. Ross, could obtain entrance into the land office of the Dawes Commission, so called, he made application for the same land to be allotted to himself and to his wife, Fannie D. Ross, as parts of their allotments, and filed contests against the allotment of the said Day, which contests were numbered 1181 and 1182 on the docket of the Commissioner to the Five Civilized Tribes (Rec., p. 14).

It further alleges that said contests were consolidated in the office of the Commissioner to the Five Civilized Tribes and tried together as one contest, and a decision was had by the Commissioner in favor of these plaintiffs in error; that an appeal was then taken to the Commissioner of Indian Affairs in Washington, D. C., and the said Commissioner of Indian Affairs affirmed the judgment of the Commissioner to the Five Civilized Tribes in an opinion dated March 6, 1907; that appeal being further taken to the Secretary of the Interior from the Commissioner of Indian Affairs, the Secretary of the Interior reversed the judgment of the Commissioner of Indian Affiairs and the Commissioner to the Five Civilized Tribes in an opinion dated May 31, 1907, in which opinion the plaintiffs declare their belief and so believing aver that the Secretary of the Interior clearly committed many grave and controlling errors of law and

clearly misapprehended the facts in the case; that the Secretary of the Interior did not take into consideration the laws of the Cherokee Nation, which alone prescribed the rule by which the right to the possession of the lands in controversy as between the contesting parties could be determined, but applied rules of the Department adopted under the United States statutes respecting settlements on the public lands of the United States, which the plaintiffs aver are not applicable in this case; that if the erroneous decision of the contests by the Secretary of the Interior is allowed to stand, and the lands described therein are allotted and patented to the defendant Day, the plaintiffs will suffer irreparable injury in their vested property rights for which they do not now and will not in the future have a full, complete and adequate remedy at law; that the plaintiffs have exhausted every remedy through the executive arm of the United States, the Interior Department, and a certificate of allotment has been issued to the defendant Day in accordance with the practice of the Commissioner to the Five Civilized Tribes (Rec., p. 14).

The petition then prays that the defendant Day be restrained from receiving or accepting an allotment certificate or deed or patent for the lands in controversy, except as trustee to hold the same for the benefit of the plaintiffs herein until such time as the court shall have heard and finally determined

the contentions of the plaintiffs herein, and, upon such final hearing and determination, the same made perpetual. That in the event the defendant James Day shall receive and accept a certificate covering the lands in controversy, this court will adjudge, order and decree that said Day shall hold such certificate for the benefit of said plaintiffs until the court shall have heard and finally determined the contentions of the plaintiffs herein, and, that upon such hearing and final determination said defendant Day be directed and commanded to surrender such certificate to J. George Wright for cancellation, and, that upon the final hearing and determination of this cause, the court will adjudge, order and decree that the plaintiff Robert B. Ross is entitled to take as part of his allotment in the Cherokee Nation as a citizen thereof the NW4 of the NE4 of the NW4 and the SE4 of the SE4 of the NE4 of section 19, township 26 north, range 13 east of the Indian base and meridian, and that the plaintiff in error, Fannie D. Ross, is entitled to take as part of her allotment in the Cherokee Nation as a citizen thereof the NE4 of the NE4 of the NW4, same section, township and range, and that the plaintiffs be decreed such other and further relief as the court in its wisdom shall deem them to be entitled to receive.

The defendant Day interposed a demurrer on four grounds as shown on page 17, which demurrer was overruled by the court on the 5th day of August,

1908, and the cause was then transferred to the District Court for Washington County, Oklahoma, the lands in controversy being located in that county.

The answer filed by the defendant Day on the 11th day of September, 1908, denies knowledge of the facts alleged in paragraphs 1, 2, 3, 6, 7 and 8 of the plaintiff's petition. He admits allegations in paragraphs 5 and 9 of the petition. Denies the allegations contained in paragraphs 10, 11, 12, 13, 14 and 15 except that there are a number of producing wells in the vicinity of the land referred to, and paragraph 16. He admits the allegations concerning the contests between the plaintiffs in error and the defendant in error and the decision thereof as stated in the petition, but denies that the Secretary of the Interior committed errors of law or misapprehended the facts in the case, and avers the fact to be that the decision of the said Secretary of the Interior reversing the decision of the Commissioner to the Five Civilized Tribes and the Commissioner of Indian Affairs was in conformity with both the law and the facts controlling the case.

He denies the facts alleged in paragraph 18 of the plaintiff's petition, and, in his paragraph 19, denies each and every material allegation contained in said petition not therein before specifically admitted or specifically denied.

Further answering, the defendant in error in his 20th paragraph states that the defendant in error Day was on the 1st day of September, 1902, and at all times since that time a duly and legally enrolled Delaware citizen by blood of the Cherokee Indian Nation qualified to receive an allotment of the Cherokee land under several laws and statutes; that the defendant Day was the owner of the possessory rights to and in all improvements upon a tract of land in the Cherokee Indian Nation within a quarter of a mile of lands described in plaintiff's petition; that the lands thus improved and owned by the defendant constitute the first improvements within a quarter of a mile of the lands as described in plaintiff's petition. That for a period of twenty-five years prior to March 5, 1904, the defendant claimed title to the lands described in the plaintiff's petition by a provision in the Cherokee law to the effect:

> "No person shall be permitted to settle or erect any improvement or cut or remove timber within a quarter of a mile of the house, field or improvement of another citizen without his, her or their consent under penalty of forfeiting such improvement and labor for the benefit of the original settler."

That in this provision of the Statutes of the Cherokee Nation the defendant claimed and had the right to the sole and exclusive use of the lands described in plaintiff's petition, alleging that on the 1st day of March, 1904, the defendant completely

enclosed the lands described in plaintiff's petition with a two or three wire fence which at the time of said enclosure comprised the only improvements upon said land other than that made by the clearing by the defendant. He further alleges that shortly thereafter the defendant Day built or caused to be built on the land above described during the month of March, 1904, a box house and fence and that the box house and fence described as belonging to defendant constituted the only improvements upon said land excepting about an acre of land in cultivation. That immediately after building the house the defendant moved his family into the box house.

In the 21st paragraph of the defendant's answer he practically repeats the allegations of the plaintiffs concerning the filing of the contests by the plaintiff in error, Robert B. Ross, for himself and wife, the plaintiff in error Fannie D. Ross, and goes more particularly into the description of the steps taken in these contests. (See Rec., pp. 22 and 23.)

What Plaintiffs in Error Claim.

By the pleadings in this cause it will be observed that the plaintiffs in error claim the right under the statutes of the United States, especially section 11 of the Act of July 1, 1902, as ratified by the vote of the citizens of the Cherokee Nation on the 7th of

August, 1902, to have the lands described herein allotted to them in severalty, by virtue of their right of possession accruing under the bill of sale of November 1, 1902, from George B. Keeler, and the acts of said plaintiffs in error, especially those which took place on or about the first of March, 1904, wherein they took physical possession of the lands, and steps, amounting to notice to all other citizens of the Cherokee Nation, looking to the improvement of said tracts by the plaintiffs in error as they had a right to do under the laws of the Cherokee Nation. We claim that under a provision of the Act of 1902, known as the Cherokee Allotment Act, especially section 18 of that act, authority was granted to every citizen who had enclosed or held possession of in any manner, by himself or through another, directly or indirectly, more land in value than 110 acres of average allotable lands of the Cherokee Nation, either for himself or for his wife or for each of his minor children, if members of the tribe, to sell the right of occupancy and possession, so held by him to other members of the tribe with the same right to take the land in allotment as was granted to such citizen by section 11 so as to include his improvements.

We claim that George B. Keeler held the rights of occupancy and possession to the lands involved in this controversy at the time of the passage of this act in 1902, even if it be a fact which we do not concede, that the fences enclosing these lands with other

lands in that locality had been partially destroyed at the time of the approval of the act. However, it was not incumbent upon us to prove that the fencing was actually still standing upon the land at that time, it being a matter to be pleaded and established by the defendant in error who has ignored that question entirely.

In order that the court may thoroughly understand the condition in the Cherokee Nation at the time of the passage of the allotment Act of 1902, it may not be improper to state it as a matter of fact, although it is not in the record, but it is a fact generally known, that at that time some of the citizens of the Cherokee Nation who were in better circumstances than others had enclosed for pasture purposes by one or two, and sometimes three wires, large areas of the prairie country in the Cooweescoowee district which embraced about half of the Cherokee Nation, that district being given over largely to the business of cattle raising in which many of the more fortunate and wealthy members of the tribe were engaged. These people were deemed by the citizens of the Cherokee Nation to have the right of possession to all of the lands thus enclosed by them and it was only by their permission that the lands thus enclosed were acquired for the purpose of allotment. They were sometimes voluntarily abandoned to some friend, while in other cases the right of occupancy was made a subject of

barter and sale. But it seems from the record we have in this case, especially the testimony of William Johnstone and George B. Keeler (pages 77 and 85), that the fencing of this tract of bottom land on the Caney River was not for the purpose of making pasture for persons who supplied the market with beef cattle, but more for the purpose of having a range for the domestic cattle of the tenants who were farming the lands which had been put in cultivation by Messrs. Johnstone and Keeler, who were engaged together in business in the town of Bartlesville. This land is about a mile and a half south of that town and near the west end of the toll bridge across the Caney River.

Our contention is that under the laws of the Cherokee Nation and the Statutes of the United States we acquired the right of possession of the 30 acres in controversy by virtue of the bill of sale from George B. Keeler dated November 1, 1902, Mr. Keeler having acquired the sole right to the possession of these lands upon a division of their interests between him and Mr. Johnstone. That is, by virtue of this bill of sale from Mr. Keeler, we acquired the same right to allot these lands as Mr. Keeler or any member of his family had before the transfer. And we further contend that the right we acquired from Mr. Keeler was strengthened and made exclusive by our Acts of March 1, 1904, before any other person had attempted to allot the land or

mark it out for possession, looking to the placing of improvements around the tracts separately, and that what we did place on the lines of these tracts was sufficient to give notice to all other citizens of the Cherokee Nation of our intention to locate the land for ourselves, independently of the fact that the defendant in error Day was present at the time and had actual knowledge of our work on this land (Rec., p. 103).

What Defendant in Error Claims.

By his answer the defendant Day bases his right to allot this land and to defeat this action on two counts. The first we think was abandoned in the trial of this cause in the courts of this state. It was presented by the demurrer overruled by the court on the 5th day of August, 1908, and by the objections of defendant in error to the taking of testimony on the ground that the complaint did not state a cause of action, misjoinder of causes of action and a misjoinder of parties plaintiff, and because the determination of the question by the Secretary of the Interior was conclusive upon the parties to this action, and that no evidence could be taken in the courts, but that the courts must pass upon the cause on the record before the Secretary at the time he determined the contest cases.

The second count upon which the defendant bases his right to a decree in his favor is predicated

upon what is known in the Cherokee Nation, under the laws of that nation, as the quarter mile usufruct, which means that by the laws of the Cherokee Nation no citizen was permitted to make an improvement within a quarter of a mile of the improvements of another citizen already made on the public domain.

On the first ground of defense we rest upon the well established rule of law that where the Land Department has by an erroneous construction of the law allotted lands in the Cherokee Nation to a citizen of the nation, which another citizen had the better right under the law to have allotted to him, the courts will set aside that allotment and give it to the citizen who had the better right. We contend that the so-called quarter mile usufruct was necessarily repealed by the allotment act which provided that the allotments must conform as nearly as may be to the areas and boundaries established by the government survey. The result of allotments being made as provided by law would be to allot all of the lands of the Cherokee Nation leaving no usufruct between the allotment of one citizen and that of another, and independently of this fact, we further contend that it is not true that the improvements of James Day were within a quarter of a mile of the nearest ten acre tract when corrected to conform to the government survey (Rec., p. 124). From this page of the record it will be observed that the nearest point to which

any improvements claimed by James Day, the defendant in error, extend, is a small area in the east part of the ten acre tract which is properly described as the SE4 of the SW4 of the NE4. This corrected to conform to the government survey would include no part of that ten acres and would be exactly one quarter of a mile from the SE4 of the SE4 of the NW4, which is the nearest tract claimed by us to the Day improvements. And the attention of the court is invited to the fact that the improvements of Lee Keys in the SW quarter of that section comes up and is contiguous to the SW corner of the ten which we claim. Also that the field of A. C. Knipe is within a very short distance from the south boundary line of our southern ten, while the northern twenty is at least one-half mile from the Day improvements.

This exhibit on page 124 is the official improvement plat used by the Commission to the Five Civilized Tribes in making the allotments to the members of the Cherokee Nation and sufficiently refutes Day's claim to the land in question by virtue of the quarter mile limit provided for in the laws of the Cherokee Nation.

Proceedings in the State Courts.

It will be observed from record pages 27 and 28 that by a stipulation of the parties this cause was referred to a referee for the purpose of taking testimony and reporting the evidence with his finding of facts to the court.

Counsel for the defendant in error, Day, in the courts below, have contended that the courts of equity had no jurisdiction to give us the relief we seek because we did not plead and prove the record upon which the Secretary passed his judgment, and this seems to have been the view taken by the courts, the Supreme Court ignoring altogether the questions of law, and treating the matter as if we had attempted to appeal from the Secretary of the Interior as an inferior court, for the correction of errors in the trial of the contest case.

This court has established the rule that the judgments of the executive departments on questions of fact would not be disturbed by the courts, unless there be allegations of fraud raised in the pleadings and established at the trial. Inasmuch as the Department's decision was reached upon an erroneous conclusion of law so alleged by us, the contentions of the defendant in error, Day, must fail. It will be observed that on page 123 of the record, the Commissioner of Indian Affairs in his decision sustain-

ing the Commissioner to the Five Civilized Tribes says that

> "while the testimony is conflicting as to whether the posts of the contestants or the fences of the contestee were first put on the land in controversy, the weight of the evidence indicates that the improvements of the contestants were made first, and your finding to that effect is not assigned as error.
>
> The contestee alleges in his motion for appeal, that the act of placing the several posts about the land in controversy by the contestants as disclosed by the evidence, was not sufficient segregation of the land in controversy, nor did the same confer the possessory right thereto upon such contestants.
>
> This appeal, therefore, raises no other question than the single issue of law as to whether the improvements of the contestants, as detailed, were sufficient to give preferential right to select the premises in allotment."

The Commissioner of Indian Affairs then affirms the judgment of the Commissioner to the Five Civilized Tribes on the authority of *Grissom* v. *Asbury*, decided by the Department November 26, 1900, and other decisions of the Indian Office following *Grissom* v. *Asbury* (Rec., p. 124), all of which decisions antedated the time when we marked out the land for our allotments.

The record here discussed by the Commissioner of Indian Affairs was the same record that the Secretary of the Interior had before him, and it will be

observed that the Secretary does not base his decision upon the facts as to who were prior in attempting to locate the land, but upon the question of law that what was done by the plaintiffs in error was not sufficient improvement of the land to entitle them to take it in allotment, although it would seem from the language used by the Secretary on page 131, if these contestants or the plaintiffs in error had made prior application for the lands to be allotted to them, their improvements would have been sufficient to sustain their right to allotment. The Secretary of the Interior says (Rec., p. 131):

> "In other words, the purpose to select a given tract cannot be effectuated by merely serving notice on the public through the medium of objects placed upon the land in lieu of proper application for the same."

It seems to be considered both in the Secretary's opinion, and in the opinion of the Commissioner of Indian Affairs, that these plaintiffs in error were the first in point of time in taking steps to subject the land to their right of occupancy which, under the laws of the Cherokee Nation, we contend, gave us absolute right over the defendant in error, Day, who not only could see the posts and clearing placed there by us, but was actually present and talked with our agents at the time that we were making these improvements. All witnesses agree that at that time there were actually no improvements of any kind on the land except a small area in the southwest corner

of the west ten of the north twenty, which was in cultivation and which was embraced in the bill of sale from Keeler to us.

As to this land in cultivation, the Secretary says that it was made by a non-resident and cannot therefore be credited to us, but the record before the Secretary showed, and before this court shows, that at the time of the passage of the Act of 1902 providing for allotments, this cultivated land was within a field with a substantial fence around it, in the possession of George B. Keeler, or Johnstone and Keeler, both citizens of the Cherokee Nation, and was either before or subsequently set apart to Keeler upon the division of the holdings between Johnstone and Keeler. It makes no difference under the law who improved this small area of cultivated land, because the Constitution of the Cherokee Nation grants to the citizens of the nation the exclusive and indefeasible right to the improvements made by them or of which they "*may rightfully be in possession.*" (Rec., p. 77.) So that it is not material, if it is true, that this cultivated land was improved by a non-citizen, if it was rightfully in the possession of Keeler and Keeler transferred it to us. We had all of his rights. So that if the Secretary's conclusion that our improvements were not sufficient to give us the right to allot the land unless we applied first for it, it was an error of law to refuse to give us credit for the acre and a half or more of cultivated land substantially

fenced, but that should have been taken into consideration to determine the sufficiency of our improvements, if that fact was material and relevant.

Priority of Possession Establishes Our Right Over Day.

But we do not concede that the right to this allotment will turn upon the sufficiency of improvements, but that the Secretary committed an error of law, as did the Supreme Court of the State of Oklahoma, in not giving effect to our right to allot the land by virtue of priority of possession as provided by the laws of the Cherokee Nation.

By the laws of the Cherokee Nation (Rec., p. 77), a citizen of the nation attempting to settle upon the public domain of the Cherokee Nation, and for the purpose of this discussion we may treat the lands in controversy as public domain at the time we did the things upon which we base our claim in part, had six months from his first settlement to make improvements to the value of fifty dollars, and we will show in this brief from the record that immediately after we left the land and before other steps could be taken, the defendant in error either during the night or early the first day after placed wires around a large section of territory, tacking them to trees and occasionally putting in a post which included in the general enclosure our lands. We think the record will bear us out in the statement that we were

first on the land, and that we at that time took steps which were sufficient to place every citizen of the nation on notice of our intention to improve the land for occupancy, and for our allotment, and besides this Day had personal knowledge of our work on these lands which in point of time antedated anything that he did. Furthermore, the authorities cited by the Commissioner of Indian Affairs in his judgment (Rec., pp. 123 and 124), antedated our improvements on this land and fully sustained our right to allot them and we had the right to rely upon those decisions of the Department for our protection.

Up to the time of the decision of the Department in this case, the rule established by the decisions cited by the Commissioner of Indian Affairs, which held in effect that any act which gave notice of the intention of a citizen to apply for any part of the public domain of the Cherokee Nation would sustain his right to allot the land, had been uniformly followed and we had a right to believe that the precedents of the former decisions of the Department would sustain our right, upon the establishment of our act of settlement on the land in question, to take the same in allotment. And besides this, Day's attempt to get in after we had given him notice by our posts and by our actual conversations with him, was a mere act of trespass upon our right under the laws of the Cherokee Nation and could confer no right upon him.

The allotment act does not attempt to prescribe a rule to determine the rights of the citizens of the Cherokee Nation as between each other to allot any lands of the nation. It does provide that each allottee shall have the right to select his allotment so as to include his improvements. Now, if under the law of the Cherokee Nation, one citizen has the right of occupancy or possession of a tract of land, the placing of improvements on that land by another citizen after this right of occupancy and possession has been acquired, is a mere act of trespass and cannot be held by any rule of conscience or law to oust the other citizen of his right of possession unless it be shown that the right of occupancy and possession has been abandoned for a period of two years. (Sec. 761, Laws of Cherokee Nation, Rec., p. 111.) This section of the Cherokee laws was put in the record by the defendant in error for the evident purpose of supporting his right to "jump" our land, but we submit that it has the contrary effect, as it is shown that we had not abandoned the land, and that the defendant in error entered and attempted to take possession within a few hours, at least less than a day, after we had left the land. This court has repeatedly held that previously to allotment the rights of the individual citizens in any given tract of land in the Cherokee Nation springs solely from the right of possession of that tract of land *(Cherokee Nation* v. *Journeycake,* 155 U. S. 180), and that this right of occupancy and possession is a valuable right.

Now we hold that that right can only be determined under the laws of the Cherokee Nation, which in this case were wholly ignored by the Secretary of the Interior and by the courts of the State of Oklahoma.

Facts Established by the Proofs

The plaintiffs in error, believing that the record will fully bear them out and proves every material allegation contained in their petition and put in issue by the answer of the defendant in error, Day, for their specific proof refer to the testimony of Robert B. Ross, especially pages 30 to 32 of the record, and plaintiffs' Exhibit "1" (Rec., p. 114), and other of the exhibits of plaintiffs showing the recognition of the plaintiffs in error, as citizens of the Cherokee Nation by blood, as alleged in their petition.

That the plaintiff in error, Robert B. Ross, acted for himself and his wife, as her agent, in the matter of selecting and allotting the land in controversy, is shown by his testimony, which begins at page 32 of the record; that the plaintiffs in error were citizens of the Cherokee Nation on September 1, 1902, and have been ever since, is shown by the testimony of Robert B. Ross beginning at page 32, and Exhibit "1" of plaintiffs' exhibits being a certified copy of the enrollment of the said plaintiffs in error found on page 114 of the record.

Record page 77 contains the proof of the allegations of fact made by the plaintiffs in error in their petition as to the laws of the Cherokee Nation and the Cherokee Constitution, on which they rely to establish their right to the possession of the lands involved in this suit by reason of their improvements thereon as against all other citizens of the Cherokee Nation.

The issue of fact raised by the pleadings touching the making of improvements on the land in controversy by the plaintiffs in error on the first of March, 1904, is established by the record in favor of the plaintiffs in error by the testimony of Robert B. Ross, page 30 *et seq.;* the testimony of James W. Duncan, the surveyor (pages 41 to 49); testimony of Hugh M. Morris (pages 54 to 60); testimony of Mrs. Lucinda Hill (pages 60 to 66); testimony of J. R. Hill (pages 66 to 71); testimony of Charles M. Ross (pages 71 to 77); testimony of the defendant in error, James Day (pages 99 to 104); and testimony of Clarence Day, a son of and witness for defendant in error (pages 104 to 107).

The plaintiffs in error refer especially to the testimony of the witnesses Duncan, Morris, Charles M. Ross and Lucinda Hill, as proof of their allegations as to the improvements on the tract of land in controversy at the time the plaintiffs in error began the surveying of the lines, clearing them up and setting posts, on the first day of March, 1904, and

besides these witnesses, the fact may fairly be said to have been established by the testimony of the defendant in error, Day, and his witness, Clarence Day.

The section of the law of the Cherokee Nation relied upon by the plaintiffs in error for their protection against trespass is in the record at page 77, and the testimony of the witnesses, Duncan, Morris, Charles M. Ross, Lucinda Hill, and the defendant in error, James Day, established the fact that the defendant in error was present at the time, and talked with said witnesses about the improvements they were, on the first day of March, 1904, putting on the tracts above described and in controversy.

And it is shown by the testimony of James Day, the defendant in error; his son Clarence, witness for the defendant in error, and Lucinda Hill, a witness for the plaintiffs in error, that it was after the said defendant in error had seen the witnesses, Duncan, Morris and Charles M. Ross, clearing up the lines and setting posts thereon, and had talked with them about the improvement of these lands; that the said defendant in error, either on the same day, during the night of that day, or early in the morning of the following day, went on the premises and erected the fence which he relied upon for his claim to a right to allot these lands and built a small box house thereon. The witness, Jim Day, the defendant in error, testified on page 103 of the record that it was

the next day after he saw Dr. Ross, the witness, Duncan, and the witness, Morris, that he put his fence around this land; he also states that when he saw them they were running the south line of the southeast ten in controversy. Stating there were no posts there and, when asked the question, "None whatever?" he replied (page 103), "We seen some posts stuck up around, but that was no fence; there were no posts, just poles, and nothing to go around it and the posts in the corner; that was all there was to it." When asked whether there were other improvements on that land at the time he was there to put up a fence around, "except those posts that you saw," he answered, "No, sir."

The witness, Clarence Day, in his cross examination (page 107), admits that there were posts that could be seen around the lands in controversy; that he saw them and saw other marks; that they were plain enough to be seen by anyone.

We think that the record establishes the allegations of the plaintiffs in error as to the actual knowledge by Day of the improvements previously placed on these lands by the plaintiffs in error, without the testimony of the witnesses, Charles M. Ross, James W. Duncan and Hugh M. Morris and Lucinda Hill, witnesses for the plaintiffs in error, for by their own testimony the defendant in error and his son, Clarence Day, who he says assisted him in putting up this fence, admits seeing and talking with the

witnesses, who placed these improvements on the lands for the plaintiffs in error. The plaintiffs in error hold to the belief that the court will find that in the testimony of the defendant in error, James Day, especially his cross examination on pages 102 and 103 of the record, and in the cross examination of Clarence Day on page 107 (a witness for the defendant in error), the fact is established according to the allegations of the plaintiffs in error that said plaintiffs in error had placed improvements on these lands before they were entered by the defendant in error for the purpose of making any improvement whatever. This allegation is also proven by the testimony of the plaintiffs' witnesses, C. M. Ross (Rec., p. 71), Hugh M. Morris (Rec., p. 54), James W. Duncan (Rec., p. 41), Lucinda Hill (Rec., p. 60), and J. R. Hill (Rec., p. 66), all of whom testified to the placing of improvements in the shape of posts along the lines of said tract and the clearing away of the underbrush so that said lines were easily observable.

The allegation of fact contained in the twentieth paragraph of the defendant's answer that the defendant's improvements were within a quarter of a mile of these lands, we think, is disproved by plaintiff's Exhibit No. 5 (see Rec., p. 124), and the testimony of Robert B. Ross (Rec., pp. 38 and 39). Plaintiffs in error, however, believe that the court will not regard this fact as a material one, because while we admit the laws of the Cherokee Nation as

to the usufruct or quarter-mile limit from the improvements of a person, still we hold that the Act of Congress providing for allotment of the lands of the Cherokees would have the effect by necessary implication to repeal that provision of law. That is to say, the laws of the Cherokee Nation would necessarily give way to conflicting provisions of a Statute of Congress, which Congress had the power to pass, and we think it will not be seriously contended that Congress did not have the power to pass the Act of 1902, providing for the allotment of Cherokee lands. From plaintiffs' Exhibit No. 5 (Rec., p. 124), it will be observed that the field of Jim Day embraces in an irregular form about half an acre of land in the southeast quarter of the southwest quarter of the northeast quarter of the section where these lands are located, which of course upon the survey of the lands would necessarily have to be corrected, so as to come up only to the east boundary line of the ten acres described, and the east boundary line is exactly a quarter of a mile from the nearest tract of the lands in controversy. It also shows that the improvements of A. C. Knipe are within about a hundred yards of the south line of the southern ten in controversy, and Mr. Day, in his testimony (pages 102 and 103 of the record), testified that part of the lands that he put the fence around at the time he fenced the lands in dispute were lost by him in contest to Mr. Keeler, the party from whom we obtained our right. The testimony of the defend-

ant in error clearly shows that at the time he went on these lands to fence them up he did so without respect to the rights of any and all other persons in or to these lands.

As an indication of the extremity to which the defendant in error went for the purpose of attempting to prove that he owned improvements on this land, we cite his testimony and the testimony of his witnesses to prove that he had occasionally cut some posts on the land; but we call attention to the fact that it is also proven by the defendant's own witnesses that numerous other persons were in the habit of cutting posts and timber on the lands in dispute. But most significant of all the evidence on this point is the testimony of William Johnstone, on page 80 of the record, which is not disputed, but is rather admitted by the defendant in error, wherein the witness, Johnstone, states that at one time he found some men at work cutting wood on this land, who either claimed that they were taking a lease from James Day or working for him, and he, Johnstone, told them that it wasn't Day's land, and the chopping was stopped.

The defendant in error has wholly failed to establish by proof the allegation in his answer, that the only improvements on the lands in controversy on the first day of March, 1904, were those placed there by the defendant in error; and, in fact, in his own testimony, and the testimony of his witnesses,

it is shown that other improvements were there before he put anything on the lands, which were the improvements, consisting of posts and clearing out of the lines, placed on the lands at the instance, and by the direction of the plaintiff in error, Robert B. Ross, acting for himself and as the agent of the plaintiff in error, Fannie D. Ross.

Errors Assigned

The assignment of errors is found on page 4 of the record, as follows:

1. The court erred in entering its decree against plaintiffs in error and in behalf of defendant in error.
2. The court erred in finding that the work performed and the posts set on the lands in controversy by the plaintiffs in error did not entitle them to select the said lands on which they, the plaintiffs in error, owned improvements, within the meaning of the Act of Congress of July 1, 1902, section 11.
3. The court erred in not holding that the right of occupancy of the lands in controversy, being in the plaintiffs in error, they were entitled to select said land to be allotted to them, under the provision of section 11 of the Act of Congress of July 1, 1902.
4. That by the decree and decision of the court the said Robert B. Ross and Fannie D. Ross are deprived of their property without due process of law, contrary to the Constitution of the United States.
5. That the decision and decree of the court in the above entitled cause is contrary to law.

ARGUMENT

Courts of equity have always been held to have power to relieve against erroneous conclusions of law by the heads of the executive departments, and in a case of this character, if, upon examination, the courts find that by the decision of the Secretary of the Interior, in the allotment of lands to an Indian, the laws applicable and governing such allotments have been violated, and, as in this case, the lands have been allotted to the wrong person, they have the power to declare the party to whom the lands have been allotted, to hold the legal title to the same in trust for the use of the rightful party. In other words, while, in this case, the Secretary of the Interior had ample discretion to adopt such means or instrumentalities as he might deem necessary to make the allotment of the Cherokee lands, he was and is bound by the law providing for such allotment, and all laws of a valid nature, under which any of the persons claiming the right to any of the land might obtain a right of property therein, which would entitle them to have the same allotted to them under the Allotment Act of July 1, 1902.

Executive officers derive their powers from the statutes. Not only must an officer have jurisdiction of the subject matter, but he must also keep within the limits of the power conferred on him by statutes.

U. S. v. *McDaniel*, 7 Pet. 1, 14;
U. S. v. *Thurber*, 28 Fed. Rep. 56.

The law is perhaps more clearly stated in the opinion of the Circuit Court of Appeals for the Eighth Circuit than anywhere else, in *Wallace* v. *Adams* (143 Fed. Rep. 720, affirmed by the Supreme Court of the United States in 204 U. S. 415), as follows:

> "By the Act of July 1, 1902, exclusive jurisdiction had been conferred on the Dawes Commission to determine under the direction of the Secretary of the Interior all matters relating to the allotment of lands, and to issue allotment certificates which shall be conclusive evidence of the right of the allottee to the lands therein described, and authority was given to the Indian agent at Union Agency to place allottees in possession of their lands upon application to him free from the writ or process of any court.
>
> * * * * * * *
>
> Nor did the grant to the Dawes Commission and to the Secretary of the Interior of exclusive jurisdiction to determine matters relating to the allotment of land and to issue certificates which are conclusive evidence of the right of the allottee to the land therein described, deprive those courts of their jurisdiction in equity, after the Commission and the Secretary have exercised their power and exhausted their jurisdiction, to determine whether by error of law or through fraud or gross mistake the Commission and the Secretary have failed to allot the land to the party who was under the law entitled to it, and have assigned it to one who had no right to it. The jurisdiction of the Commission in the allotment of the lands of the Choctaw and Chickasaw Nations

are the same in effect as the jurisdiction and effect of the action of the land department of the United States in the disposition of the public lands within its control. The Commission under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands, and to execute its judgments by the issue of the *allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property.* (The italics ours.) This tribunal undoubtedly has exclusive jurisdiction to determine such claim and to issue such a conveyance. The allotment certificate when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. *(U. S.* v. *Winona & St. Peter R. Co.,* 67 Fed. 954-55.) Like a patent, it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate to the wrong party by an erroneous view of the law or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and change the legal title to the land in the hands of the allottee, as he may that of a grant to the patentee, with his equitable right to it, either on the ground that upon the facts found, conceded or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case, which caused them to issue the cer-

tificate to another, or that through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect. (*Jones* v. *Germania Iron Co.*, 107 Fed. 597-600.) The lands in controversy here have been allotted to the plaintiffs below. They are no longer the property of the tribe."

The unmodified laws of the Cherokee Nation alone must govern in the matter of the ownership of improvements on and the right of possession of the lands in controversy.

In *Mackey* v. *Coxe* (18 How. 100), this court discussed the force and effect to be given to the laws of the Cherokee Nation as follows:

> "The principal difference between the relation to the Federal government of the Cherokee Nation and that of a territory in its second grade of government, consists in the fact that the Cherokees enact their own laws, under the restrictions stated in the Treaty of 1835, article 5, appoint their own officers, and pay their own expenses, this, however, is no reason why the laws and proceedings of the Cherokee Territory, so far as relates to rights claimed under them, should not be placed on the same footing as other territories in the Union. It is a domestic territory—a territory originated under our Constitution and Laws."

To the same effect are the decisions of this court in *Cherokee Nation* v. *Georgia* (5 Pet. 1); *Cherokee Trust Funds* case (117 U. S. 228), and *Talton* v. *Mayes* (163 U. S. 376).

We have alleged and established in the Record the laws of the Cherokee Nation which give to the plaintiffs in error the right as against all other citizens of the Nation to have possession of the lands in controversy, and said laws were binding as much upon the Secretary of the Interior as upon the citizens of the Cherokee Nation, the same not being in any respect in violation of the Constitution or laws of the United States, and the Cherokee Nation having been given the authority in the 5th Article of the Cherokee Treaty of 1835 (7 U. S. Stat. 478), by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them. We contend that the laws of the Cherokee Nation referred to by us in our petition (Rec., pp. 9, 10 and 12) and in the testimony taken before the referee (Rec., p. 77), as well as the report of the referee, gave us the right of possession of the tracts of land in controversy as against the defendant in error, and that the Secretary of the Interior erred in not allotting the lands to us.

The Plaintiffs in Error Had No Remedy at Law.

No appeal could be taken from the Secretary of the Interior, so that his decision might be reviewed by courts of law in a direct proceeding; therefore, it

was incumbent upon us, if we would protect our right, to seek relief in the courts of equity."

We had no remedy at law in the courts for two reasons: *First*, at the time we brought this suit and at all times since the bringing of this suit the legal title was in the defendant in error, by virtue of the certificate issued from the authorities of the government of the United States, having jurisdiction in the matter of the allotment of the lands of the Cherokee Nation, and our right, if any, was an equitable one, of which courts of law could take no jurisdiction. And *second*, if the legal title had been in us or such a superior title as would entitle us to recover, the remedy at law would have been in ejectment, and there was no court in existence at the time of the bringing of this suit, which had jurisdiction of a real action in the Indian Territory. Therefore we allege in our petition that we have no full, complete and adequate remedy at law through which we could gain relief.

The jurisdiction and powers of the Secretary of the Interior in allotment of Cherokee lands were like those exercised by the Land Department over public lands.

In the *Wallace* v. *Adams* case, above cited, it will be observed that the court holds that the jurisdiction of the Secretary of the Interior, and his subordinates, was like that exercised by the Land Depart-

ment of the government in the matter of settlements on and disposition of the public lands of the United States. There is a long line of authorities of the federal courts and state courts which we confidently cite in support of our contentions in this case, although they relate to the disposition of the public lands of the United States, and not to the allotment of Indian lands. The leading authorities, both state and federal, on this question are as follows:

Johnson v. *Towsley*, 13 Wall. 72, 20 L. 485;
Rector v. *Gibbon*, 111 U. S. 276, 28 L. 427;
R. R. Company v. *Forsythe*, 159 U. S. 46, 40 L. 71;
Hand v. *Cook*, 92 Pac. 3;
Musgrove v. *Harper*, 94 Pac. 187.

On What Record This Case Should Be Determined.

We confidently assert that the record made before the referee in this cause is the only record that this court has the power to examine, because, by the constitution of the State of Oklahoma, the District Courts, even in cases where appeals may be taken to those courts, can only try cases *de novo*, and, if the court had jurisdiction at all of this case, it could only try the same upon the record brought into the court through its own processes. In this case by stipulation a referee was appointed by the court, and the record made through the introduction of testimony and other proofs before him. If upon that record the

facts show that we own the improvements on the lands in controversy, and had a right to their possession, at the time the defendant in error claims to have made the improvements described by him, then the conclusion is inevitable that the Secretary of the Interior, in allotting the lands to the defendant in error and issuing a certificate to him, allotted them to the wrong person under the allotment Act of July 1, 1902, and the court below therefore erred in finding for the defendant in error in the face of the record it had before it. It will be presumed that the defendant in error would be able to and would make as strong defense before the courts, as he did in the contests before the executive departments of the government.

We believe that this court, upon the examination of the record now before it, and the authorities that we have herein cited, must reverse the decree of the court below and remand this cause to that court, with instructions to vacate its former decree, and enter a decree in favor of these plaintiffs in error, as the owners of the equitable estate in the lands in controversy.

Respectfully submitted,

KENNETH S. MURCHISON,
Solicitor for Plaintiffs in Error.

INDEX

AUTHORITIES

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1913.

No. 122.

ROBERT B. ROSS and FANNIE D. ROSS,
Plaintiffs in Error,

vs.

JAMES DAY, *Defendant in Error*

STATEMENT *of the* CASE

The parties to this suit were duly enrolled citizens of the Cherokee Indian Nation. The lands described in this record were a portion of the common lands of the Cherokee Tribe. The same were duly allotted to the defendant in error by the Commissioner to the Five Civilized Tribes. Thereafter the plaintiffs in error instituted contest proceedings against the defendant in error with respect to these lands, before the Commissioner to the Five Civilized

Tribes. After a hearing conducted by this official the lands were awarded to the plaintiffs in error. The decision of the Commissioner to the Five Civilized Tribes appears at pages 116 to 121 of the record. Upon appeal to the Commissioner of Indian Affairs, this decision was affirmed. The decision of the Commissioner of Indian Affairs appearing at pages 121 to 124 of the record. Upon appeal to the Secretary of the Interior, the two decisions just referred to were reversed, and the lands in controversy were awarded to the defendant in error. The decision of the Secretary of the Interior appears at pages 133 to 136 of the record. Thereafter, the plaintiffs in error filed their motion for a rehearing, which motion was denied by the Secretary of the Interior. The decision of the Secretary of the Interior denying the motion for a rehearing appears at pages 132 and 133 of the record. Thereafter, a patent covering the lands in controversy was duly issued to the defendant in error.

The plaintiffs in error then brought this suit in equity to avoid the decision of the Secretary of the Interior and charge the legal title of the defendant in error, derived by said patent, with a trust in favor of the plaintiffs in error. The decision of the lower court was adverse to the plaintiffs in error, which decision was affirmed by the Supreme Court of Oklahoma in *Ross* v. *Wright*, 116 Pac. 949, the full text of the opinion appearing at pages 149 to 155, inclusive, of the record.

It appears from the bill of plaintiffs in error (Rec., pp. 8-15), and from the evidence introduced in support thereof (Rec., pp. 30-96), that the plaintiffs in error seek to avoid the findings of fact contained in the decision of the Secretary of the Interior, as well as the conclusions of law contained therein. For the convenience of the court, we here insert the full text of the decision of the Secretary of the Interior which the plaintiffs in error seek to avoid:

"A.A.G. Department of the Interior. J.W.H.
1500-1907. Office of Indian Affairs, W.C.P.
G. W. W. Washington, May 31, 1907. S.V.P.

The Commission of Indian Affairs.

SIR: May 16, 1907, your office transmitted the record in the consolidated Cherokee contests, entitled, Robert D. Ross v. James Day and Fannie D. Ross v. James Day, Nos. 1181 and 1182, on appeal by the contestee from your office decision of March 6, 1907, in favor of the contestants, the land involved in case number 1181 being the NW4 of NE4 of NW4 and the SE4 of SE4 of the NW4 of Sec. 19, T. 26 North, R. 13 East of the Indian Meridian, containing twenty acres, and, in number 1182 the NE4 of the NE4 of the NW4 of the same section, containing ten acres.

The contestants are citizens by blood of the Cherokee Nation. The contestee is a full-blood registered Delaware. All are entitled to allotments in the Cherokee Nation.

Contestee's application of May 5, 1904, for the land described above, was duly allowed. Ac-

cordingly, contestants' subsequent application, tendered July 1, 1904, was refused.

Contestants claim they have a preference right to select the land by reason of ownership of improvements thereupon and possession of the same prior to the date of contestee's application. Opposed to this claim contestee relies upon the fact that he was the first to apply for the tract and asserts in connection therewith that he used and improved the land and resided thereon before he applied for it.

There is no seriour difference of opinion as to the facts in the case. The land involved includes two tracts near Bartlesville, one of which contains twenty acres; and the other is a detached piece of land, containing ten acres, and lies south of the former, but in the same quarter section. Both tracts were claimed by the firm of Johnstone and Keeler prior to 1902, and constituted a portion of a large tract which was wholly or partly inclosed at one time by wire fence. The members of the firm divided their holdings between them and Keeler took that part of the land held by them which included the land in controversy. November 1, 1902, Keeler transferred his interest in the land last referred to, with the improvements thereon, to the contestant by 'bill of sale' witnessed, but not acknowledged, before a notary. It is evident that at this time the fencing was pretty well down, and that the land contained no improvements of material value, constituting as it did a portion of the extensive Delaware holdings in which the firm dealt prior to 1902, the extent of their interest in such lands being disclosed in a number of cases. Contestants do not appear

to have made any effort to take possession of the place until the fall of 1903.

Then Mr. Ross, according to his testimony, employed a man to take a load of posts to the place for the purpose of fencing it, but the lines were not located or the posts set at the time. Apparently, nothing further was done until March of the year 1904. Contestant then sent his son, Dr. Charles M. Ross, to look after his interests in the matter. The latter, March 1, 1904, visited the land and, with the assistance of a surveyor and two other persons, located the lines of the land in controversy and indicated the same by setting thereon posts or stakes. Dr. Ross testified concerning the work which was done by him and under his supervision that day, and although his testimony was given in the interest of his parents, it shows clearly the unimproved condition of the land at the time. Although he meant, no doubt, to establish priority of improvements, he did something else than that, for he testified as follows:

Q. How came you to do this work, doctor? Did you have instructions from your father?

A. Yes, sir. I knew he owned it, and I was going up there for the purpose of looking at some other land, and he asked me to see about this land and to get all the information about it I could, and I went down there and found it without any improvements upon it and saw that unless something was done to reduce it to actual possession it would be public domain.

Q. Did Jas. Day have any improvements of any kind or character upon that land on the 1st day of March, 1904, when you went down there

and ran out the lines and placed these posts for the fencing.

A. When I was there on the 1st day of March, 1904, there was absolutely no improvements of any character on it, unless you would consider a few pieces of wire about 8 inches, where it had been cut off of the trees, the old Johnson pasture. No houses, no fencing, no cultivated land except that west half of the north 20.

The cultivation referred to by Dr. Ross included about one and a half acres, and, being the result of the efforts of a non-citizen named Bixler, who farmed adjacent lands, cannot be credited to contestants.

And bearing further upon the character of the alleged improvements made by Dr. Ross and his associates March 1, 1904, it is observed that the posts used to inclose this thirty acres were cut and set in about five hours; that some of the posts were about the size of a man's arm and others were mere stakes or poles; that they were placed from fifty to one hundred feet apart, except at the corners, where it appears that five posts were set in comparative proximity. The posts bounding the tract were not joined by wire or otherwise so as to make a connected fence. No further act of improvement or occupation can be fairly conceded the contestants.

Passing now to the testimony of the contestee and his witnesses, it is found that he has lived in the neighborhood of the land for about thirty years; that he alleges he has claimed it for twnety-five years past, and that he has been cutting timber and posts from it, as well as fuel,

all the time. It further appears that when he learned, March 1, 1904, of the efforts being made by Dr. Ross and his party to survey and enclose the land, he immediately went to Bartlesville and purchosed $45 of wire with which he proceeded to fence the tract. In so doing he cut part of the posts and bought part. He was assisted by his son and the work required about two days and a half day. In constructing the fence two wires were used for the greater part of its length, and the controverted tract was substantially inclosed. In addition, the contestee did that which is also deemed of much importance, but to it no special referrence is made either in your office decision or that *or that* of the Commissioner to the Five Civilized Tribes. After fencing the land and before filing thereon he erected a three-room house, at a cost of about $250, on one of the tracts, and immediately took up his residence therein.

The Department concluded that the fences upon the tract in question at the time of the alleged purchase from Keeler were not of sufficient consequence or value in connection with the land to be entitled to be classed as improvements; that the 1.45 acres of cultivation thereon cannot be credited to anyone save the non-citizen, Bixler, that the system of posts established by Dr. Ross, March 1, 1904, did not constitute a lawful improvement, and that said posts were set merely for the purpose of marking or defining a prospective allotment. It is further found that the improvements erected by contestee were build, possibly, a little later than the former, but were of material value to the land; also that he actually entered into posses-

sion of the tract. In view of his residence thereon it does not matter that the money used by him in erecting improvements was obtained from an oil company in the form of an advance bonus, particularly as the alleged relation of debtor and creditor seems to have been genuine.

This case comes within the decision of the Department of even date in the Cherokee case of Blakeney v. Bishop, wherein it was held that whatever is alleged to be an improvement must, in order to give a preference right of selection, be truly such, rather than a mere monument to define a prospective allotment. See also decision of even date in the Cherokee case of Bible v. White. In other words, the purpose to select a given tract cannot be effectuated by merely serving notice on the public through the medium of objects placed upon the land in lieu of proper application of the same.

The decision of the Department of November 26, 1900, in the Creek case of Grissom v. Asbury, No. 16, is relied upon in this and similar cases. There the decision was rendered prior to the ratification of either of the Creek agreements and involved right in the Creek Nation arising under the Act of June 28, 1898 (30 Stat. 495), and the laws of the tribe enacted prior thereto. Its applicability to a Cherokee case has not been shown, and it is not clear, therefore, that it should be invoked as a precedent for present action. Assuming, however, that the law under which it was decided was clearly analogous to the law governing the allotment of Cherokee lands, said decision should be applied with great caution, even as to minors, and within the limitations prescribed herein and in the

decision of even date in the cases referred to above.

Premises considered, your said decision of March 6, 1907, affirming that of the Commissioner to the Five Civilized Tribes, in favor of contestants, is hereby reversed, and the land in controversy is awarded to James Day, the contestee.

The papers herewith returned.

Very respectfully,

JAMES RUDOLPH GARFIELD,

Secretary."

ARGUMENT and AUTHORITIES

It is contended by counsel for plaintiffs in error that this case is to be determined by the same principles which apply in suits of similar character with respect to the public lands. This we concede to be the law. Accordingly, in response to the brief filed by counsel for plaintiffs in error, we assert two general propositions:

First. The findings of fact contained in the decision of the Secretary of the Interior are conclusive upon this Court.

Second. The Secretary of the Interior committed no errors of law in the decision sought to be avoided by plaintiffs in error.

We will discuss these propositions in their order.

The findings of fact contained in the decision of the Secretary of the Interior are conclusive upon this court.

In paragraph 16 of plaintiffs' bill (Rec., p. 13), it is alleged that the defendant in error filed upon the land in controversy, and that thereafter the plaintiffs in error instituted contest proceedings against the defendant in error, with respect to such lands, before the Cherokee Land Department. The

following allegation then appears in paragraph 17 of the bill:

> "That the said contests, Numbers 1181 and 1182, were consolidated in the office of the defendant, J. George Wright, and heard as one contest, and *after full hearings, both parties being present with their witnesses and attorneys* (italics ours), the Commissioner to the Five Civilized Tribes decided both said contests in favor of contestants, the plaintiffs herein (plaintiffs in error). The contestee, the said defendent Day (defendant in error), having appealed from the decision of the Commission to the Five Civilized Tribes, to the Commissioner of Indian Affairs at Washington, D. C., said Commissioner affirmed the same in an opinion dated March 6, 1907. From this decision the contestee (the said Day defendant in error), further appealed to the Secretary of the Interior, who in an opinion dated May 31, 1907, erroneously and in total disregard of the rights of the plaintiffs herein, reversed the said Commissioner of Indian Affairs and the Commissioner to the Five Civilized Tribes."

The portion of the bill of plaintiffs in error referred to above, brings this case squarely within the rule announced in *Vance* v. *Burbank*, 101 U. S. 514, and kindred cases. In *Vance* v. *Burbank, supra*, this court says:

> "So far as this suit depends on the original title of Lemuel Scott, it is clear, under the well settled rules of decision in this court, that there can be no recovery. The question in dis-

pute is one of fact; that is to say, whether Scott, when he demanded his patent certificate as against the other contesting claimants, had resided on and cultivated the lands in dispute for four consecutive years, and had otherwise conformed to the requirements of the Donation Act. This was to be determined by the Land Department, and as there was a contest, the contending parties were called on in the usual way to make their proofs. They appeared, and full opportunity was given Scott to be heard. He presented his evidence and was beaten, after having taken the case through, by successive stages on appeal, to the Secretary of the Interior. This, in the absence of fraud, is conclusive on all questions of fact. We have many times so decided. *Johnson* v. *Towsley*, 13 Wall. 72 (80 U. S. XX 485); *Warren* v. *Van Brunt*, 19 Wall. 646 (86 U. S. XXII 219); *Shepley* v. *Cowan*, 91 U. S. 330 (XXIII 424); *Moore* v. *Robbins*, 96 U. S. 530 (XXIV 848); *Marquez* v. *Frisbie*, at this term (*ante*, 800). The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final as to the same extent that those of other judicial or *quasi* judicial tribunals are.

It has also been settled that the fraud, in respect to which relief will be granted in this class of cases, must be such as has been practiced on the unsuccessful party and prevented him from exhibiting his case fully to the Department, so that it may properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if

the disputed matter has actually been presented to or considered by the appropriate tribunal. *U. S.* v. *Throckmorton (ante,* 93); *Marquez* v. *Frisbie (supra).* The decision of the proper officers of the Department is in the nature of a judicial determination of the matter in dispute."

See also, *Quinby* v. *Conlan,* 104 U. S. 420;
Gonzales v. *French et al.,* 164 U. S. 338;
Greenameyer v. *Coate,* 212 U. S. 434;
Baldwin v. *Starks,* 107 U. S. 463;
Shepley v. *Cowan,* 91 U. S. 330.

The doctrine of *Vance* v. *Burbank* is again announced in *Ross* v. *Stewart,* 227 U. S. 530, in which Mr. Justice Van Deventer, speaking for the court, says:

"The contest was not *ex parte,* as were the proceedings involved in *United States* v. *Minor,* 114 U. S. 233, 240-243, 29 L. ed. 110, 112-114, 5 Sup. Ct. Rep. 806; *Sanford* v. *Sanford,* 139 U. S. 642, 644, 650, 35 L. ed. 290, 291, 293, 11 Sup. Ct. Rep. 666; and *Svor* v. *Morris,* 227 U. S. ..., post 385, 33 Sup. Ct. Rep. 385, but was an adversary proceeding to which the plaintiff was a party, of which he had due notice, and in which he had full opportunity to meet and controvert the very allegations he now says were untrue. The question whether they were true or otherwise is one the decision of which was committed by law to the administrative officers as a special tribunal, and they, as is conceded, decided that the allegations were true, their action being in the nature of a judicial determin-

ation. The applicable rule in such a case is, that the misrepresentation and fraud which will entitle the unsuccessful claimant to relief against the decision and resulting patent must be such as have prevented him from fully presenting his side of the controversy, or the officers from fully considering it; and it is not enough that there may have been false allegations in the pleadings, or that some witness may have sworn falsely."

The principle deducible from the cases referred to above, is that where the complaining party has been accorded a full hearing before the Land Department, or where he has had an opportunity for a full hearing, then the findings of fact of the officials of the Land Department are conclusive.

The conditions which alone will justify a court of equity in avoiding the findings of fact in a case such as this, are that a fraud was practiced upon the complaining party which prevented his having a fair hearing before the land office, or that the officials of the Land Department themselves were guilty of some fraudulent practices which deprived the complaining party of an opportunity to fully exhibit his case to them. The plaintiffs in error utterly fail to either plead or prove one or the other of these conditions; that is, they neither plead nor prove that fraud was practiced upon them, which deprived them of a full hearing, and they neither plead nor prove any fraudulent acts on the part of

the officials of the Department, which had a like effect. On the contrary, it is affirmatively alleged in their bill that a full hearing was accorded, and that they attended this hearing with their witnesses and their attorneys. This, we say, brings them squarely within the rule announced by the cases referred to above, and the findings of fact of the Secretary of the Interior, as contained in his decision, must stand as conclusive.

The plaintiffs in error do allege that when the defendant in error was permitted to file upon the lands in controversy, he falsely and fraudulently swore that he was the owner of the improvements thereon. (Paragraph 16 of Bill, Rec., p. 13.)

This, however, was one of the issues in the contest case, and, therefore, the findings of fact of the Secretary of the Interior upon this question cannot be inquired into by this court.

> "False testimony or forged documents even, are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal."
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> *United States* v. *Throckmorton*, 98 U. S. 61;
>
> *Vance* v. *Burbank, supra;*
>
> *Greenameyer* v. *Coate, supra.*

For some reason plaintiffs in error simply alleged and attempted to prove upon the trial hereof the facts upon which they predicated their claim to

the improvements upon the lands in controversy, and the consequent preferential right to select the same in allotment. An examination of the record shows that this course of procedure was followed, over the objection of the defendant in error. The plaintiffs in error, therefore, simply submitted for the consideration of the court below the same issues of fact which had already been passed upon and determined by the Secretary of the Interior. This method of procedure is entirely contrary to the principles upon which a court of equity will review the findings of fact of a special tribunal in cases of this description. Accordingly, we assert that the findings of fact contained in the decision of the Secretary of the Interior are conclusive upon this court.

The Supreme Court of Oklahoma, in its consideration of this case, has the following to say upon the proposition under discussion:

> "On the first proposition, which is that the Department misapprehended the facts, neither plaintiffs' pleading nor proof bring them within the rule applicable where patents are set aside because of the action of the Department upon the facts. In such cases it must be pleaded and proven that either through fraud or gross mistake it fell into a misapprehension of the facts proved. *Gonzales* v. *French et al.*, 164 U. S. 338, 344, 17 Sup. Ct. 102, 41 Law ed. 458. When attack is made on a patent on this ground, to avoid the Department's findings of fact, the party must allege and prove not only that there was

a mistake in the finding, but the evidence before the Department from which the mistake resulted must be established to the end that the particular mistake which was made and the way in which it occurred, or the fraud, if any, which induced it, may be before the court, as a trial which takes place in a case of this character is in effect a trial of the contest case itself for the purpose of ascertaining whether it has been correctly determined on the law and facts, the presumption, of course, being that the decision of the land department is correct, and this presumption will obtain until it has been overcome in the manner indicated. [Citations.]" (Rec., pp. 151-152.)

The Secretary of the Interior committed no errors of law in the decision sought to be avoided by plaintiff in error.

If it is true that the findings of fact made by the Secretary in his decision are conclusive, then the remaining question is to ascertain whether or not upon the facts so found by the Secretary, the law was wrongly applied.

An analysis of the decision of the Secretary discloses the following material facts:

"That November 1, 1902, one Keeler transferred his interest in the improvements on the lands in controversy to the plaintiffs in error. The Department finds at this time the fencing was pretty well down and that the land contained no improvements of material value; that

the plaintiffs in error made no attempt to take possession of the place until the fall of 1903; that at the time mentioned, the plaintiffs in error caused a load of posts to be put on the land; that nothing further was done until March, 1904. The Secretary then refers to the testimony of Dr. Ross to the effect that on the 1st day of March, 1904, there were absolutely no improvements of any character on the land, excepting a few pieces of wire about eight inches where it had been cut off the trees of the old Johnson pasture, no house, no fencing and no cultivated land, except the west half of the north 20 which the Secretary found to belong to a non-citizen named Bixler, and could not therefore be credited to the plaintiffs in error. As to the improvements made by Dr. Ross March 1st, 1904, the Secretary finds that the posts used by Dr. Ross to fence the 30 acres were made and set in about five hours; that some of the posts were about the size of a man's arm and others were mere stakes or poles; that they were placed from fifty to one hundred feet apart, except at the corners, where it appears that five posts were set in comparative proximity. The posts bounding the tract were not joined by wire or otherwise, so as to make a connected fence. No further act of improvement or occupation can be fairly conceded to the contestants."

The foregoing facts are the ones upon which the plaintiffs in error must predicate their contention, that they owned such improvements upon the lands in controversy at the time that the defendant in error filed thereon, as to create in them a preferential

right to select such lands in allotment. The conclusion of the Department upon these facts is in the following language:

> "The Department concluded that the fences upon the tract in question at the time of the alleged purchase from Keeler, were not of sufficient consequence of value in connection with the land to be entitled to be classed as improvements; that the 1.45 acres of cultivation thereon cannot be credited to anyone save the non-citizen, Bixler; that the system of posts established by Dr. Ross, March 1, 1904, did not constitute a lawful improvement, and that said posts were set merely for the purpose of marking or defining a prospective allotment. It is further found that the improvements erected by contestee were build, possibly, a little later than the former, but were of material value to the land; also that he actually entered into possession of the tract. In view of his residence thereon it does not matter that the money used by him in erecting improvements was obtained from an oil company in the form of an advance bonus, particularly as the alleged relation of debtor and creditor seems to have been genuine."

The findings of fact referred to above and the conclusions of law of the Secretary of the Interior based thereon, are so mutually dependent and so interwoven as to fall within the principle announced in *Marquez* v. *Frisbie et al.*, 101 U. S. 473. This court, in considering certain language in *Moore* v. *Robbins*, 96 U. S. 530, to this effect,

> "in cases where it is clear that those officers have, by mistake of the law, given to one man land which on the undisputed facts belonged to another,"

said:

> "The meaning of this and the sound principle is, that where it is a mixed question of law and of fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

We assert, therefore, that this court is now called upon to determine a mixed question of law and fact, and that this court cannot so separate them as to clearly see where the mistake of law is, and that, accordingly, the decision of the Secretary of the Interior is conclusive.

However that may be, we assert with positive conviction that the acts done by the plaintiffs in error with respect to this land, as found by the Secretary of the Interior, did not constitute such an improvement of said lands as would create in the plaintiffs in error a preferential right to select the same in allotment.

The operative provision of the so-called Cherokee Treaty, "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes," approved July 1, 1902 (32 Stat. L. 716), are as follows:

"*Sec. 6.* The word 'select' and its various modifications, as applied to allotments and homesteads, shall be held to mean the formal application at the land office, to be established by the Dawes Commission for the Cherokee Nation, for particular tracts of land."

"*Sec. 11.* There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allotable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the government survey, *which land may be selected by each allottee so as to include his improvements.*" (Italics ours.)

It follows from section 11 that the only circumstance which determines the preferential right of one Cherokee citizen to select a particular tract of land in allotment over another is the ownership of improvements on the land by the citizen claiming such preferential right. Now, the question is, what is meant by the term "improvements"? In this case, the Secretary of the Interior has held that the mere setting of posts around the land by the plaintiffs in error was not a sufficient "improvement" of the same within the meaning of the law. Now, was this an erroneous application of the law by the Department? Section 6 of the act prescribed the manner

in which Cherokee citizens might select their allotments. With respect to all unimproved land, a formal application made in pursuance of this provision would vest in the applicant an equitable title to the lands selected. A title thus selected would be valid against the claim of any other Cherokee citizen. Section 11, however, creates a distinction in the case of improved land. In this regard, the owner of the improvements thereon has a preferential right to select the same in allotment. Now, what is the exact meaning of this term "improvements," as used in this act?

At the time provision was made by this legislation for the allotment of lands of Cherokee citizens, Congress had in mind, of course, the situation of the members of the tribe and the state of development of the Cherokee Nation. The tribe had occupied the lands to be distributed for sixty-five or seventy years. The law-makers knew that in this interval members of the Cherokee Tribe had improved thousands of acres of their lands. This improvement obviously consisted of such betterments as are incidental to an agricultural people, namely, the lands were cleared, broken up, and reduced to cultivation. The same were inclosed by fences, and houses, barns and other structures had been erected by these people. To subject all of these lands to the selection of the first formal applicant would work a manifest injustice. The industry and toil of these

people should be recognized and protected. It was in this spirit that Congress enacted this legislation, and it certainly must be obvious that the purpose of the provision referred to was to protect these Indians in the substantial improvements already made by them.

Counsel for plaintiffs in error contend that any monument placed upon a tract of land by a Cherokee citizen, which was sufficient to give notice to other citizens that the lands in question were claimed, complied with this statute. But, in answer to this, we assert that the act provided another method of declaring an intention to select a particular tract of land in allotment, namely, the appearance of the applicant before the Land Office and his formal designation of the lands desired as his allotment. The lands of the Cherokee Tribe were divided into two distinct classes: Unimproved lands which were subject to allotment by the citizen first applying therefor, and improved lands which were subject to the preferential right of selection by the Indian owning the improvements thereon.

This court has repeatedly held that the contemporaneous construction of the officials of an executive department, charged with the duty of administering the law to be construed, is to be given great weight by the courts. The Secretary of the Interior, in his decision of this matter, refers to other contest cases in which he applied this law in exactly

the same manner as was done in this case. It is a fair inference that the principle announced in this decision by the Secretary controls in the allotment of all of the lands of the Cherokee Tribe, and, no doubt, of the other Five Tribes as well, as the treaties were practically identical upon this point. We do not believe that this court, at this time, will be disposed to set aside this construction of the Act of Congress referred to by the Secretary of the Interior.

Counsel for plaintiffs in error contend that the Cherokee tribal laws have some bearing on the determination of this case. In response, we content ourselves with saying that the Act of Congress referred to above was necessarily the law under which the Cherokee tribal lands were to be allotted. This was the law which controlled the administration of these matters by the Secretary of the Interior.

The Supreme Court of Oklahoma, in holding that the Secretary of the Interior committed no errors of law in this case, say:

> "It is to be noted that the Secretary of the Interior in his decision concludes that the acts of plaintiffs of March 1, 1904, did not constitute a lawful improvement, that the posts set were set merely for the purpose of marking or defining a prospective allotment, and were not improvements as contemplated in the federal statute. Necessarily to the extent of any conflict between the federal statute and the law of the

Cherokee Nation, the former controls, because Congress has plenary legislative authority in all matters relating to the Indian Tribes and their affairs. *Lone Wolf et al.* v. *Hitchcock*, 187 U. S. 553, 23 Sup. Ct. 216, 46 L. ed. 299; *Gleason et al.* v. *Wood* (an opinion recently handed down by this court, but not yet officially reported), 114 Pac. 703. The Cherokee act was a rule established by that nation prior to the congressional allotting act for the control of internal affairs relating to its people and their lands, and therein was recognized a right growing out of a claim or mere location on the public domain. Doubtless under the operation of this act, where acts were done amounting to the making of a claim or location sufficient to give notice of the intended claim or location and the improvements were thereafter made in accordance with the law, the right would date back to the time of the making of the claim or location.

This right was recognized by this act, and it is this right, along with the claim that the posts constituted improvements, which counsel for plaintiffs seek to have recognized by this court, and which he says the Secretary of the Interior ignored. The federal statute and the rules and regulations of the Department of the Interior made thereunder, providing the law and the procedure governing the allotment of the land of this tribe, were passed long after this act, and did not recognize this location right established by the Cherokee law, but provided, as we have seen, that the allotments might be selected by each allottee so as to include—not his claim or location, but—his improvements. If an allottee did acts upon a tract of land which

would meet the requirements of the statute and sufficient to be denominated improvements, then, if first in them, he would and should be held to be first in right. The construction and holding of the Secretary of the Interior we deem fully justified by the statute which we hold superseded the Cherokee law on the subject, and on the question of whether the posts were improvements, we are not able to say that the conclusion of the Secretary on the evidence before him was wrong, for, while conclusions of law reached by the Department of conceded facts are not binding upon the courts, it has been held that they should not be set aside nor annulled unless they are clearly erroneous. *Hand et al.* v. *Cook et al.*, 29 Nev. 518, 92 Pac. 3."

We think that the decision of the Supreme Court of Oklahoma is a correct interpretation of the law applicable to this case.

Respectfully submitted,

JAS. A. VEASEY,
Solicitor for Defendant in Error.

ROSS *v.* DAY.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 122. Argued December 11, 1913.—Decided January 5, 1914.

Whether parties had actually improved Cherokee lands in such sense as to give them a preferential right of selection and allotment under § 11 of the act of July 1, 1902, c. 1375, 32 Stat. 716, is not a mere question of law but one of fact and law, and, as far as it involves the drawing of correct inferences from the evidence it is a question of fact.

Where, in such a case, the whole controversy depends upon whether the allotment was in accord with actual ownership of the improvements

thereon and there is neither fraud nor clear mistake of law in the decision of the Secretary of the Interior on final appeal to him, his findings are conclusive.

29 Oklahoma, 186, affirmed.

THE facts, which involve the title to certain lands allotted under the Cherokee Indian Allotment Act of July 1, 1902, are stated in the opinion.

Mr. Kenneth S. Murchison for plaintiffs in error:

The rights of possession are to be determined by Cherokee laws.

Plaintiffs had no remedy at law.

The jurisdiction and powers of the Secretary of the Interior in allotment of Cherokee lands were like those exercised by the Land Department over public lands.

The record made before the referee in this cause is the only record that this court has the power to examine, because, by the constitution of the State of Oklahoma, the District Courts, even in cases where appeals may be taken to those courts, can only try cases *de novo*, and, if the court had jurisdiction at all of this case, it could only try the same upon the record brought into the court through its own processes. See *Cherokee Nation* v. *Georgia*, 5 Pet. 1; *Cherokee Nation* v. *Journeycake*, 155 U. S. 180; *Cherokee Trust Funds*, 117 U. S. 228; *Hand* v. *Cook*, 92 Pac. Rep. 3; *Johnson* v. *Towsley*, 13 Wall. 72; *Jones* v. *Germania Iron Co.*, 107 Fed. Rep. 597; *Mackey* v. *Coxe*, 18 How. 100; *Musgrove* v. *Harper*, 94 Pac. Rep. 187; *Rector* v. *Gibbon*, 111 U. S. 276; *R. R. Co.* v. *Forsythe*, 159 U. S. 46; *Talton* v. *Mayes*, 163 U. S. 376; *United States* v. *McDaniel*, 7 Pet. 1; *United States* v. *Thurber*, 28 Fed. Rep. 56; *United States* v. *Winona & St. P. R. R. Co.*, 67 Fed. Rep. 954; *Wallace* v. *Adams*, 143 Fed. Rep. 720; aff'd 204 U. S. 415.

Mr. Jerre P. O'Meara, with whom *Mr. James A. Veasey* was on the brief, for defendant in error:

The findings of fact contained in the decision of the Secretary of the Interior are conclusive upon this court.

The Secretary of the Interior committed no errors of law in the decision sought to be avoided by plaintiffs in error. See *Vance* v. *Burbank*, 101 U. S. 514; *Quinby* v. *Conlan*, 104 U. S. 420; *Gonzales* v. *French*, 164 U. S. 338; *Greenameyer* v. *Coate*, 212 U. S. 434; *Baldwin* v. *Starks*, 107 U. S. 463; *Shepley* v. *Cowan*, 91 U. S. 330; *Ross* v. *Stewart*, 227 U. S. 530; *United States* v. *Throckmorton*, 98 U. S. 61; *Moore* v. *Robbins*, 96 U. S. 530; 32 Stat. 716.

MR. JUSTICE PITNEY delivered the opinion of the court.

This action was brought by the present plaintiffs in error for the purpose of obtaining a decree declaring the defendant in error to be a trustee for the plaintiffs with respect to the title to certain lands in the Cherokee Nation (a tract of twenty acres, and a separate tract of ten acres within the same quarter-section), that were allotted to defendant in error under the act of July 1, 1902, 32 Stat. 716, c. 1375. The decision of the Oklahoma Supreme Court in favor of the latter is reported in 29 Oklahoma, 186.

Plaintiffs are citizens by blood of the Cherokee Nation, and entitled to allotments under § 11 of the act; defendant is a registered Delaware, entitled to allotment under § 23. Defendant filed applications in the Cherokee Land Office for the lands in controversy on May 5, 1904, and they were set apart to him as portions of his allotment selection. Later, and on July 1 in the same year, the plaintiff, Robert B. Ross, appeared at the Land Office and made application for the same lands, a portion to be set apart to himself and a portion for his wife. These applications being refused because the lands had already been selected by defendant, plaintiffs immediately brought contests, which were consolidated and heard together by

the Commissioner to the Five Civilized Tribes, and he decided in favor of contestants. Upon appeal to the Commissioner of Indian Affairs this decision was affirmed. But upon a further appeal to the Secretary of the Interior there was a decision against the plaintiffs and in favor of defendant. The contests were based upon the same alleged equity upon which the present action is founded; that is, contestants, admitting the prior allotments to contestee, insisted that his application was subject to their prior right of selection upon the ground that they were the owners of improvements that were upon the property at the time contestee entered upon it. The question turns upon the effect of § 11 of the act of July 1, 1902, 32 Stat., p. 717, already referred to, which reads as follows: "There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, *which land may be selected by each allottee so as to include his improvements.*"

The findings of the Secretary were as follows: That the lands in question were claimed prior to 1902 by a firm of Johnstone & Keeler, Cherokee citizens, and constituted portions of a large tract which was at one time wholly or partially inclosed by wire fence; that the members of the firm divided their holdings between them, and Keeler took that part which included the lands in contest; that on November 1, 1902, Keeler transferred his possessory interest in this land, with the improvements thereon, to the contestants by bill of sale; but at this time the fencing was pretty well down, and the land contained no improvements of material value, except that about one and a half

acres were under cultivation by one Bixler, a non-citizen who farmed adjacent lands, but whose improvement was not to be credited to contestants; that contestants did nothing in the way of placing improvements upon the property until March 1, 1904, when their son, Dr. Ross, visited the land, and, with the assistance of a surveyor and two other persons, located the lines, and indicated them by setting posts or stakes; that these posts were cut and set by two men in about five hours; that some of the posts were about the size of a man's arm, and others were mere stakes or poles; that they were placed from 50 to 100 feet apart, except at the corners, where five posts were set in comparative proximity; the posts bounding the tracts were not joined, by wire or otherwise, so as to make a connected fence; and no further act of improvement or occupation was done in behalf of the contestants. That, on the other hand, the contestee, who had lived in the neighborhood of the land for about thirty years and claimed to have cut timber, posts, and fuel upon it for twenty-five years past, when he learned on March 1, 1904, of the efforts made by Dr. Ross and his party to survey and inclose it, immediately purchased the necessary wire and proceeded to fence the property, cutting a part of the posts and buying part; that, he being assisted by his son, the work required about two and a half days; that in constructing this fence two wires were used for the greater part of its length, and the controverted tracts were substantially inclosed; that after thus fencing the land, and before filing thereon, he erected a three-room house at a cost of about $250 upon one of the tracts, and immediately took up his residence therein.

The Secretary of the Interior concluded that the fences upon the tracts in question at the time of the alleged purchase by the plaintiffs from Keeler were not of sufficient consequence or value in connection with the land to be entitled to be classed as improvements; that the

posts established by Dr. Ross, March 1, 1904, did not constitute a lawful improvement, but were merely set for the purpose of marking or defining a prospective allotment; and further, that the improvements erected by contestee, while built possibly later than the former, were of material value to the land, and also that contestee actually entered into possession.

The contention of the plaintiffs in error here, as in the court below, is that under the laws of the Cherokee Nation and the act of Congress they acquired the right of possession of the lands in controversy by virtue of the bill of sale from Keeler, dated November 1, 1902, and thereby succeeded to the same right to allot these lands that Keeler had before; that this right was made exclusive by what was done on March 1, 1904, looking to the placing of improvements upon the tracts; that this was sufficient to give notice to other citizens of the Cherokee Nation of the intention of plaintiffs to locate the lands, and that defendant was present at the time and had actual notice of the work done by Dr. Ross. Reference is made to the constitution of the Cherokee Nation, Art. I, § 2, and to its laws (1892), §§ 706, 761, and 762. It will not be necessary to recite them at length, because all that is claimed with respect to their effect upon the present controversy was conceded or assumed in the decision of the Secretary of the Interior; that is, that citizens of the Cherokee Nation might improve portions of the public domain within the Nation, and thereby establish a prior right to the possession of the improved lands, which right might be transferred to another citizen by a sale of the improvements. The Secretary evidently construed § 11 of the act of Congress of July 1, 1902, as recognizing and confirming this right. But he held that no valuable interest was acquired by plaintiffs under the purchase from Keeler because Keeler owned no improvements of material value. He found plaintiffs were not entitled to credit for the

small improvement of the non-citizen Bixler, and there is nothing before us to show that the Keeler bill of sale included the Bixler improvements, or that Bixler held as tenant either of Keeler or of plaintiffs. And he held in effect that the question of the sufficiency of what was done by contestants on March 1, 1904, depended not upon whether it was sufficient to give notice to contestee, but whether it was sufficient to constitute an improvement within the meaning of the act of Congress. And so the whole controversy in effect depended upon whether the allotment to defendant was in accord with the ownership of the actual improvements upon the land, and the fact respecting the improvements was the principal matter to be determined in the contest proceedings, wherein the final appeal was to the Secretary of the Interior.

In order to obviate the established rule that the decisions of the Executive Departments in matters confided to them by the acts of Congress are not to be disturbed by the courts unless there be allegations of fraud raised in the pleadings and established at the trial, it is contended that this rule extends only to findings upon mere questions of fact, and that the decision of the Secretary of the Interior upon the contest here in question was based solely upon an erroneous conclusion of law.

But, in our opinion, whether plaintiffs had improved the lands in such sense as to give them a preferential right under the statute was not a mere question of law, but rather a mixed question of law and fact. So far as it involved an appreciation of the term "improvements," as employed in the statute, it was a question of law; so far as it involved the drawing of correct inferences from the evidence it was a question of fact. At best, it was a close question, about which reasonable men might well differ.

In *Whitcomb* v. *White*, 214 U. S. 15, 16, this court, speaking by Mr. Justice Brewer, said: "The decision of the

Land Department was not rested solely upon the fact that White's formal application was filed a few hours before that of the trustee for the occupants of the townsite, but rather chiefly upon the priority of the former's equitable rights. So far as such decision involves questions of fact it is conclusive upon the courts [citing cases]. And this rule is applied in cases where there is a mixed question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. As said by Mr. Justice Miller in *Marquez* v. *Frisbie*, *supra* [101 U. S. 473], p. 476: 'This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.'" And see *Moore* v. *Robbins*, 96 U. S. 530, 535; *Quinby* v. *Conlan*, 104 U. S. 420, 426; *Gonzales* v. *French*, 164 U. S. 338.

There being no fraud, and no clear mistake of law in the decision of the Secretary of the Interior, his findings are conclusive upon the parties in the present controversy.

Judgment affirmed.